1284 **No. 3624.** 1285

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Louisa Pickens et al.,
Appellants,
vs.
J. H. Merriam et al.,
Appellees.

Brief of Appellees J. H. Merriam, Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth.

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When this case was in this court before *upon the bill of complaint* (Pickens v. Merriam, 242 Fed. 363), this court, *assuming* all the facts alleged in the bill of complaint to be true, followed the decision of the supreme court of Kansas in an almost identical case upon a like appeal upon the pleadings (Pickens v. Campbell, 98 Kan. 518), held that the facts alleged, if true, did entitle appellants herein to *some* relief, and therefore that the bill of complaint was improperly dismissed on motion. But when, upon a *trial on the merits*, it came to proving the facts alleged, the trial court in the state of Kansas [see memorandum of decision, Tr. pp. 706-

715], and the supreme court of Kansas (Pickens v. Campbell, 104 Kan. 426, 179 Pac. 343; also found at pp. 720-731 of the transcript), and the U. S. District Court for the Southern District of California [see opinion of Judge Bledsoe, Tr. pp. 194-200], all decided and held that there was no fraud shown or anything in the record entitling appellants to any relief. These appellees invite this court's special attention to these three opinions and decisions. It would certainly seem that if any such wholesale and indiscriminate fraud existed as appellants contend for, that some one of the numerous judges who have carefully examined the record and the evidence upon which appellants rely to prove their charges, would have so held. It is also significant that none of the other six brothers and sisters of Ferdinand Fensky, nor the father of the intervenor Charles Fensky, during his lifetime are complaining or ever saw sufficient merit in the charges of fraud to join the complainants either in this action or in the similar action filed in the courts of Kansas against Campbell and the sureties on his bond.

This brief is filed only on behalf of appellees J. H. Merriam, Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth. Appellees Amanda Katzung, Corrine Loveland and Don Ferguson have no connection or relationship to these appellees and are not represented by counsel.

Appellants are residents of Kansas and Nebraska respectively and appellees residents of California. The

amount involved as alleged in the bill of complaint exceeds $3,000.00.

STATEMENT OF FACTS.

The "statement of the case" contained in the brief of appellants is so radically at variance with the facts shown by the evidence, and is also so meagre, that it becomes necessary for these appellees to briefly summarize the facts in their entirety.

Ferdinand Fensky, a resident of California, died intestate and without issue August 7, 1903, leaving real and personal property in the state of California and also in the state of Kansas, as follows:

Real estate in Kansas, covered by contracts to sell [Tr. pp. 507, 322-6]	$22,965.75
Real estate in Kansas, not covered by contracts to sell, as near as can be ascertained [Tr. pp. 299, 322-326, 465-502]	15,000.00
Real estate in California, appraised at [Tr. pp. 526-8]	6,200.00
Personal property in Kansas and California [Tr. pp. 294-302, 529]	21,506.00
Total	$65,671.75

Appellants' statement that the aggregate amount was $80,000.00 is not correct.

He left as his heirs at law his widow, Jeanette Fensky, and as collateral heirs seven brothers and sisters (two of whom are appellants herein and one of whom is the deceased father of the intervenor),

and a nephew who was the sole surviving issue of a deceased brother.

There is no dispute but that the descent of real property situated in Kansas is governed solely by the laws of Kansas, and that the descent of the personal property in Kansas and the real and personal property in California is governed by the laws of descent of the state of California, the domicile of Ferdinand Fensky at the time of his death. Under the laws of Kansas (Sec. 2953 Gen'l Stats. Kansas, sections 8 and 20 of An Act Concerning Descents and Distributions) the widow is entitled to all of the real property owned by her husband at the time of his death and to one-half of the personal property within the state. Under the laws of descent of California the widow is entitled to one-half of the separate property of the husband, real and personal (Sec. 1386 Cal. Civ. Code); and as to community property she is entitled to three-fourths, whether real or personal. (Sec. 1402 Cal. Civil Code.) It is to be observed that the law of descent of the state of Kansas as to personalty is the same as the law of descent of the state of California as to the separate property of the husband, both real and personal.

Ferdinand Fensky and Jeanette Fensky were married in Kansas, more than thirty years prior to his death, and resided there until January, 1902, when he moved to California. [Tr. p. 621.] At the time of his marriage, he was apparently in very meager circumstances. He was then engaged in the ice business in Topeka, Kansas, commencing on a very small

scale, delivering his ice in a wheelbarrow personally, and Mrs. Fensky was running a boarding house. [Tr. p. 621.] For several years, at a later time Mr. Fensky had a hotel, Mrs. Fensky doing the cooking for the hotel part of the time. [Tr. p. 622.] During the later years of his residence in Topeka he was a contractor and builder [Tr. p. 275], and bought land and subdivided it, as Fensky's Addition to Topeka, and built a number of houses on the lots and sold them on conditional sale contracts with forfeiture clause. He removed his residence to San Pedro, California, in 1902. All of the real property in California, as elsewhere, which he possessed at the time of his death, was acquired after marriage. Mr. Fensky had intended making a will covering all his estate to his widow but failed to do so. [Tr. pp. 329, 593.]

At the request of the widow [Tr. p. 328], M. T. Campbell, who had been Mr. Fensky's attorney and agent for years, and who was familiar with all the details of his affairs in Kansas [Tr. pp. 302, 329], was appointed administrator in Kansas on September 9, 1903. [Tr. p. 292.] Due to the fact that a note and mortgage (the so-called Stoker mortgage) was in Campbell's hands and needed to be satisfied of record at once, the property having been sold [Tr. pp. 294, 331], Mr. Campbell did not wait for the written appointment of the widow [Tr. p. 337] but was appointed on the petition of one J. W. McClure. [Tr. pp. 291-2.] In October, 1903 [Tr. p. 575], Jeanette Fensky, the

widow, was appointed as administratrix of her husband's estate in California.

On October 26, 1903, Campbell filed an inventory in the probate court of Shawnee county, Kansas, showing $4297.14 money collected from the Stoker mortgage referred to above, and Kansas notes and mortgages sent to him from California after the death of the deceased for convenience of administration, appraised at $16,640.50. He listed the real property owned by Ferdinand Fensky, including the real property in the Fensky Addition which Ferdinand Fensky had contracted to sell. [Tr. pp. 293-302.]

Jeanette Fensky, as administratrix in California, filed an inventory [Tr. pp. 524 *et seq.*] setting forth the real property in California appraised at $6200, and the personal property consisting of one promissory note for $400, and the household furniture appraised at $100. The appraisal was made by three qualified and disinterested persons duly appointed by the probate court [Tr. pp. 524, 631] who before appraising the property took an oath of office to truly, honestly and impartially appraise the property of said estate. [Tr. p. 525.] All of these appraisers died before the trial. It is claimed, but without one iota of evidence in support of the claim, that the widow procured these three appraisers to underappraise the real property of the estate in California.

The parcel of land at San Pedro, California, and appraised at the sum of $3000 [Tr. p. 528], upon which Mr. and Mrs. Fensky lived at the time of his

death, was set apart to the widow by a judgment of the superior court of Los Angeles county under date of November 4, 1903, as a probate homestead, under the provisions of sections 1464 to 1468 of the Code of Civil Procedure of California. [Tr. pp. 632-3.] This judgment is assailed on account of the alleged false representation of the widow that the property was worth less than the $5000 limit for homesteads under the California law, and that the property was community property.

The Kansas notes and mortgages listed by Campbell in his inventory were in California at the time of the death of Ferdinand Fensky, but, after some correspondence, were not inventoried in California but were sent to Campbell as administrator, for the purpose only of convenience in collecting these notes and mortgages, which were all on Kansas property and made by persons living in Kansas, and particularly so that Campbell could satisfy these mortgages of record promptly as administrator. [Tr. pp. 334, 338, 342, 345, 346, 348, 352, 357.] The laws of descent of the state of Kansas and of California relating to these notes are the same. (Sec. 1386 Cal. Civ. Code; Sec. 2953 *et seq.* Gen'l Stats. of Kansas, 1909.)

In view of the fact that Ferdinand Fensky left a large number of notes executed by persons living in Kansas, some of which were secured by Kansas real estate, and also left a number of parcels of real estate in California, which would have to be collected or sold

at considerable expense and delay, if distribution was to be made to the heirs, one-half to the widow, and one-sixteenth to each of the eight collateral heirs, Mr. Campbell and Mr. Goodrich came to the conclusion that it would "simplify matters and shorten up the proceedings for Mrs. Fensky to buy out the interests of the other heirs," and so advised her and the other heirs. [Tr. pp. 329, 339.] The widow, however, did not make up her mind apparently to do so until October 6, 1903 [Tr. fol. 354], when she suggested that Campbell negotiate with the brothers and sisters of Mr. Fensky in Topeka with a view of buying out their interests in return for some of her Kansas real property. [Tr. p. 354.] All the negotiations looking toward the purchase of the interests of the collateral heirs were conducted by Mr. Campbell [Tr. p. 457], with the result that each of them, including appellants, sold out his or her interest to Mrs. Fensky for the sum of $1000.00 each, with the exception of Fred Fensky, the last one to sell out, who was paid $1100.00. [Tr. pp. 580-585.] Each of them assigned all of their interests in the estate of Ferdinand Fensky to Mrs. Fensky. [Tr. pp. 580-585.]

Thereafter, on June 5, 1905, the probate court in Kansas [Tr. p. 306] distributed all of the estate of Ferdinand Fensky administered on in Kansas to Jeanette Fensky, his widow. [Tr. p. 306.] She receipted for it in her *individual* capacity [Tr. p. 308] and not as "administratrix," as appellants misleadingly state, at

page 104 of their brief, and on June 6, 1905, Campbell was discharged as administrator in Kansas. [Tr. p. 307.]

On April 11, 1905, the balance on hand in California, remaining after distribution "and all other properties belonging to said estate, whether described herein or not," was distributed by decree of the superior court of Los Angeles county, California, a court of record of general jurisdiction, as follows: "To Hulda Richter, sister of deceased, 1/16 part thereof, and all the remainder to Jeanette Fensky, said widow of deceased." [Tr. p. 642.]

The total appraised value of the personal property in Kansas and the real and personal property in California, was $27,727.64. [Tr. pp. 294, 302, 526-529, 634-5.] Upon the settlement of the final accounts, the following charges and expenses of administration were allowed:

Expense of administration in Kansas, not including the administrator's fees.....$ 437.44

Expense of administration in California, including amount of family allowance and the probate homestead set apart to the widow... 4,719.62

The administrator's fees of Mr. Campbell were paid for by the widow by cancelling a note of Campbell to the estate for the sum of $1,500.00 [Tr. pp. 439-440], which was inventoried. [Tr. pp. 434, 294.] This did not include any compensation to Campbell as the agent of Mrs. Fensky in looking after her individual real

property in Kansas. [Tr. p. 440.] To summarize the total expenses of administration, as shown by the above items, in Kansas and California, was $6,657.06, which, when deducted from the total gross appraised value of the property in Kansas and California, left a net balance of $21,149.08.

It is claimed by appellants that the assignment executed by them to the widow were obtained by the fraudulent representations of Campbell acting as agent for Mrs. Fensky, the widow, and that such fraudulent representations constituted extrinsic fraud in that because of such releases they did not appear in the probate courts of Kansas and California, and that therefore the decrees of distribution by the probate courts of Kansas and California in the matter of the estate of Ferdinand Fensky, should be disregarded.

The chief one of the alleged false representations claimed to have been made by Campbell arises out of his inventorying as real estate the various parcels of land in Topeka, Kansas, which Ferdinand Fensky had conditionally contracted to sell prior to his death, and his failing to inventory said contracts *as personal property*, and his alleged concealment of the existence of such contracts, the balance due upon which at the time of the death of Ferdinand Fensky amounted to $22,965.75 [Tr. p. 507]. These identical contracts were held by the supreme court of the state of Kansas, in Pickens v. Campbell (104 Kan. 425, 179 Pac. 343; see the pleadings and record in that case set out in the transcript at pp. 670-731), based on a rule of prop-

erty in Kansas established by a long line of decisions running as far back as 1870, not to work an equitable conversion or to give the vendee any title, legal or equitable, in the property. Mr. Campbell, who was a practicing lawyer in Kansas for many years [Tr. p. 275], after first securing the opinion of the California attorney for the estate, and for the sole purpose of determining at the threshold of his administration how the real property covered by these contracts should be treated and inventoried,—both attorneys acting independently and before the widow decided to negotiate for the purchase of the interests of the collateral heirs [Tr. p. 354],—decided that the property covered by such contracts continued to be real property, the legal and equitable title belonging to Mr. Fensky at the time of his death unaffected by the contracts, and descended, under the laws of Kansas, directly to his widow. Campbell did not inventory the contracts as personalty. His failure so to do and his alleged fraud in concealing the existence of these contracts, constitutes the gravamen of appellants' case.

There are several other comparatively very small items which it is claimed were concealed by Campbell and the widow and not inventoried either in California or Kansas, aggregating in all about $5,200.00, as follows:

1. The Stein and Simms notes, treated as having been given by Ferdinand Fensky to his wife prior to his death [Tr. pp. 265,456]. . . .$2,700.00

2. The indebtedness of Kimmerlee to Mrs. Fensky [Tr. pp. 377, 378, 422, 424]	300.00
3. Balance in First Trust & Savings Bank, Pasadena, in joint account of "Mrs. Jeanette Fensky or Mr. F. Fensky" [Tr. p. 252]	500.00
4. Certificate of deposit payable to "F. or Jeanette Fensky" or "to the order of either on the return of this certificate properly indorsed" [Tr. p. 258]	800.00
5. Balance in Citizens State Bank of Topeka, Kansas, on October 5, two months after the death of Ferdinand Fensky, amounting to $942.82, of which $913.57 was receipted for to the bank by M. T. Campbell as agent for Mrs. Jeanette Fensky, and regarded by the bank, Campbell and Mrs. Fensky as her individual property collected from Kansas realty [Tr. pp. 309, 310, 343, 355, 454]	913.57
Total	$5,213.57

NOTE: Even if it appeared, which it does not, that the foregoing items had belonged to the estate of Ferdinand Fensky and were improperly omitted from the inventory thereof, it would not have appreciably increased the 1/16 interest of each of appellants.

In 1903 and again in 1904 there was a tremendous flood, caused by the overflow of the Kansas River flowing through Topeka, which caused great damage and seriously affected property values, and the ability of the holders of the notes and mortgages inventoried to pay the same. [Tr. pp. 274, 277, 367, 420.] Camp-

bell represented to appellants that a number of the persons owing the estate on the notes and mortgages inventoried in Kansas wanted more time in which to pay, and that if Mrs. Fensky, the widow, should purchase their interests, so that collection would not have to be forced for the purposes of distribution amongst the heirs, she could accommodate these people and still eventually collect nearly all the money on the notes, but that if collection were forced there would necessarily be much expense and loss attending the collection. [Tr. pp. 393-4.] Only a few of them had been paid in July, 1904, when appellants made their assignments [Tr. 461-2], and many were unpaid nearly a year later at the time of distribution [Tr. p. 445]. Appellants claim (without support by the record) that Campbell fraudulently represented to appellants that many of these notes were not collectible and that considerable loss would thereby result to the estate. We think this includes a statement of all of the various charges of fraud made in connection with the estate of Ferdinand Fensky.

Appellant, Louisa Pickens, testified that she first acquired knowledge of the alleged fraudulent acts complained of in 1912. [Tr. p. 280.] Appellant Johanna Schutt and intervenor Charles Fensky did not testify, and from all that appears in the record may have acquired knowledge thereof ten years before this suit was filed.

Appellant Louisa Pickens has lived in the city of Topeka since 1875, and resided there at the time her

brother, Ferdinand Fensky, made the subdivision of Fensky's Addition, in which the property covered by most of the contracts to sell was located. [Tr. pp. 266, 279.] She visited back and forth with her brother Ferdinand Fensky, who resided in Fensky's Addition. [Tr. pp. 274-5-6.] Ferdinand Fensky, up to the time of his leaving Kansas in 1902, superintended the building of houses on this addition, making the plans and building the houses himself. [Tr. p. 275.] A comparison of the list of the realty contracts to sell [Tr. pp. 506-7] with the list of insurance policies [Tr. p. 361] shows that the real property covered by these contracts was improved with the houses constructed by Mr. Fensky.

Mrs. Krause, upon the advice of whose husband both appellants Schutt [Tr. p. 273] and appellant Pickens [Tr. p. 279] depended, frankly admits that in 1903-1904 she knew of the Fensky addition and that her brother Ferdinand Fensky was building houses and selling them, that no one else was doing so in the Fensky Addition, that the purchasers were living in the houses, and that she knew the names of a few of them. [Tr. p. 277.]

Mrs. Pickens was but little acquainted with M. T. Campbell in his lifetime. She depended on Mr. Krause and what she knew about the estate she learned from Mr. Krause. [Tr. p. 279.] Campbell mentioned the contracts to Mr. Krause, advising him that the "transactions in the Fensky addition were all real estate" and frankly expressed his conviction that the collateral

heirs had nothing to do with them. [Tr. p. 269.] It also appears that the sale of property in this addition was advertised by Ferdinand Fensky in the newspapers and that there was a big "For Sale" sign on the addition. [Tr. p. 274.] The addition was on the main highway and the street car line from Topeka to Oakland, Kansas, runs near the Fensky addition. [Tr. p. 278.] Mrs. Schutt was in Topeka during the time that the addition was being laid out, and when it was being built up, and corresponded with Mrs. Krause about the time that Mrs. Krause assigned her interest to Mrs. Fensky. [Tr. p. 278.] It also appears that Fred Fensky, a brother of the deceased, came over to Topeka from Leavenworth and made an investigation. [Tr. p. 275.] He stayed there at the home of Mr. and Mrs. Krause for two days and told Mrs. Krause that he "went to Fensky's addition and looked over the property." [Tr. p. 277.] On July 25, 1904, said Fred Fensky called upon Mr. Campbell and quizzed him about the land and "trenched very closely upon the idea that those contracts were personal property and subject to the same law covering the distribution of the rest of the personal property." [Tr. p. 399.] He then wanted to know why the notes and mortgages taken from the purchasers under these contracts were not "personal property of the estate." [Tr. p. 399.] Campbell frankly explained to him his opinion that the property covered by these contracts belonged to the widow individually and not to the estate." This was

just four days before Appellant Louisa Pickens and her sister Mrs. Krause assigned their interest in the estate to Mrs. Fensky and nine days before Mrs. Schutt assigned her interest. [Tr. pp. 399,583-4.]

It appears that Fred Fensky employed an attorney by the name of Jackson to represent him [Tr. p. 412] and that he later, apparently satisfied that these contracts were not personalty but realty, and that the widow's offer was fair, accepted the same. [Tr. p. 584.] It also appears that Mrs. Wendt, a sister residing in Germany, made an inquiry through the American Consul [Tr. pp. 269, 276, 406], who employed an attorney by the name of Slater to investigate matters for her [Tr. p. 423], who came to the conclusion that the widow's "offer was a square thing." [Tr. p. 424.]

Between November, 1903, and August, 1904, deeds were recorded in said Shawnee county from Fensky and his wife to fifteen of the holders of the realty contracts listed on pages 506-7 of the transcript, most of said deeds being dated in April, 1903 [prior to Mr. Fensky's death, and signed and acknowledged by him], and in most cases there was recorded at the same time, mortgages on the property, all dated and acknowledged subsequent to the death of Ferdinand Fensky, which apparently represented a part of the purchase price. [Tr. pp. 325-6.] And between August, 1904, and June, 1906, deeds to nearly all of the other purchasers in said list were recorded in said Shawnee County, most of them being also dated in April, 1903 (prior to Mr.

Fensky's death, and signed and acknowledged by him) [Tr. pp. 322-4], and mortgages representing a part of the purchase price were recorded on or about the same date, in most instances. [Tr. pp. 324-5.]

On the 18th day of September, 1907, Jeanette Fensky executed and acknowledged deeds for the conveyance of all of the real estate owned by her in California to appellees in this action, other than J. H. Merriam and Don Ferguson. [Tr. pp. 623-5, 565, 566, 573.] All of this California property with the exception of that covered by the deed to Mrs. Katzung was acquired by her after Mr. Fensky's death. What identical funds were used in buying these properties does not appear from the record. On the same day she executed a will, devising and bequeathing "to the living nieces and nephews of my deceased husband, Ferdinand Fensky, all my real estate, land contracts, mortgages and mortgage notes on land in Shawnee County. Kansas." [Tr. pp. 732, 648.] This will did not purport to cover any of her California property. Said deeds were all drawn in the office of said Don Ferguson, a real estate agent in Pasadena, who had been acting for several years in making purchases and sales of real property, collecting rent, etc., for Mrs. Fensky. [Tr. pp. 565-6.] The deeds were executed by Mrs. Fensky for the avowed purpose of wanting "to dispose of her property" "by deeding it to the people she wanted it to go to." [Tr. p. 573.] These deeds were delivered to Mr. Ferguson in the presence of the grantees with instructions to hold them and to record them

upon her death. [Tr. pp. 566, 573, 623.] The deeds were in his custody until her death, when they were recorded. [Tr. pp. 566, 573.] They were never back in her hands. [Tr. p. 566.] Ferguson testified that she told him that if he got a chance to sell any of this property at a profit to do it and that she would "make it right" with the grantee in said deeds delivered as aforesaid. [Tr. pp. 565-6.] She later deeded to a stranger one of the parcels covered by one of those deeds.

Appellee Farnsworth, a niece of Mrs. Fensky, who lived with her up until the time Mrs. Fensky died [Tr. p. 622], who was present at the time the deeds were signed, denied that Mrs. Fensky instructed Mr. Ferguson to sell any of the property covered by said deeds. [Tr. p. 623.]

Jeanette Fensky died on July 9th, 1908, in Los Angeles, leaving as her sole surviving next of kin two sisters, Mrs. Schmidt and Mrs. Katzung, and a brother, Mr. Wellke, who are appellees herein. [Tr. pp. 664, 625.] These surviving next of kin soon after the death of Mrs. Fensky, sought the advice of J. H. Merriam with reference to administration upon her estate, and being unable to agree upon any one else to act as administrator with the will annexed for that portion of the estate in California, they urged J. H. Merriam to act in that capacity and he finally consented to do so. Said Wellke, Katzung and Schmidt filed their petition for probate of will August 1st, 1908, alleging that they were the next of kin and heirs at law of said Jeanette

Fensky [Tr. p. 645], and said will was admitted to probate in California on August 14th, 1908, and letters of administration with the will annexed issued to said J. H. Merriam.

The estate in California was appraised at about $3,500.00 [Tr. p. 653], consisted largely in claims against the said Don Ferguson, Amanda Katzung and others, and a great deal of controversy developed over said claims. And said administrator made a great effort to secure an amicable settlement regarding the same, and finally succeeded in doing so on a compromise basis without litigation. [Tr. pp. 614-616, 654.]

These negotiations occupied about a year's time, and no inventory was filed until the said compromise arrangement satisfactory to all concerned was consummated, and then upon the filing of the inventory, on September 8th, 1909, a final account and petition for distribution was also filed, and a decree of distribution made and entered on September 22d, 1909. [Tr. pp. 663-4.] This decree contained the customary omnibus clause, distributing "all other property whether described herein or not." [Tr. p. 664.] Actual distribution was made in accordance with the decree, and upon filing vouchers showing such distribution, an order of discharge of said J. H. Merriam, as administrator with the will annexed of the estate of said Jeanette Fensky, deceased, was made and entered on October 13th, 1909. [Tr. pp. 664-5.]

After the said will of Jeanette Fensky was probated in Los Angeles County, an authenticated copy of the

same was admitted to probate in the Probate Court of Shawnee County, Kansas, and on the 9th day of October, 1908, was recorded therein, and said Campbell was appointed administrator with the will annexed and proceeded to administer upon that portion of said estate described in said provision in said will. [Tr. p. 313. His final account and petition for distribution was heard and settled in said court on the 13th day of May, 1913, and distribution made of the amount in his hands for distribution to the twenty-two legatees described in said clause in said will, of whom five were the children of the plaintiff Louisa Pickens and two were the children of the plaintiff Johanna Schutt. [Tr. pp. 315-8.]

In spite of the omnibus clause in the decree of distribution of the estate of Jeanette Fensky distributing *all* the property of her estate, *whether described in the decree or not*, to the deceased's next of kin, appellees Wellke, Schmidt and Katzung, who were determined by the court in that decree to be "her only heirs at law" [Tr. pp. 663-664], it is claimed by appellants that the deeds to appellees signed and delivered by Jeanette Fensky to appellees were not properly delivered, and that the properties covered thereby are *unadministered assets* of her estate, to which they *as collateral heirs of Jeanette Fensky*, are entitled. They also claim that the Campbell and the new Stein notes for $1,000 and $600 respectively, the first of which Mrs. Fensky gave and *delivered* to her nieces, appellees Farnsworth and Love-

land, jointly [Tr. pp. 454, 608, 610], and the second of which to her sisters, appellees Katzung and Schmidt [Tr. pp. 607-608], were fraudulently omitted from the inventory of her estate. It is also claimed that Judge Merriam, the administrator, fraudulently omitted these items from his inventory. Although the evidence is slightly conflicting as to whether Judge Merriam knew of the circumstances surrounding, he denied such knowledge [Tr. p. 606] and is supported by the weight of the evidence, which is too voluminous to detail here. He, and Campbell, who was named as executor of Mrs. Fensky's will, after consulting together, concluded that the notes mentioned were valid gifts to the persons above named, and Campbell accordingly paid his note to the said donees thereof. None of the other next of kin, *who were the only persons ever appearing in the estate,* objected, but consented thereto. [Tr. p. 613.] It is admitted by the pleadings that during the pendency of the proceedings for the probate of the estate of Jeanette Fensky appellants *"paid attention to said proceedings* and from time to time secured copies of papers that were filed therein." [Tr. pp. 27, 53.] Appellants never appeared in said estate proceedings, or claimed to be heirs, or asked to have their alleged heirship determined therein, or did anything to make known to the court or appellees herein, their present claims to be the sole heirs of Jeanette Fensky until this suit was filed.

On May 15th, 1914, appellants herein filed in the District Court of Shawnee County, Kansas, their peti-

tion against said M. T. Campbell and Thomas Page and E. C. Arnold, the two latter being the sureties on the bond given by said M. T. Campbell, as administrator of the estate of said Ferdinand Fensky, and in said petition substantially the same facts are alleged as the ground of the cause of action therein, and in addition the execution of the bond of the administrator of said estate of Ferdinand Fensky in the state of Kansas, copy of said bond being attached to said petition. [Tr. pp. 670-680.]

Subsequently the separate answer of said M. T. Campbell was filed on December 10, 1914. [Tr. pp. 684-690.]

Said M. T. Campbell died on March 1st, 1915. His son, Donald A. Campbell, was appointed as administrator with the will annexed of his estate, and said action was thereafter revived in the name of said Donald A. Campbell, administrator. [Tr. pp. 690-691.] Thereafter appeals were taken to the Supreme Court of Kansas from the judgment overruling said demurrers, and said judgment was affirmed. (Pickens v. Campbell, 98 Kan. 518.) Answers were afterwards filed by said defendants [Tr. p. 692], and upon a trial of the merits at which practically all of the documentary evidence introduced in the case at Bar appeared in evidence, judgment was rendered against complainants and in favor of the administrator of M. T. Campbell's estate, the lower court rendering an opinion reviewing the Kansas decisions and the evidence. [See Tr. pp. 706 to 719.] An appeal was

thereafter taken to the supreme court of Kansas, which affirmed the judgment of the district court of Shawnee County, Kansas. (Pickens v. Campbell, 179 Pac. Rep. 343. Copy of that decision also appears at pages 720 to 731.)

In considering this case the court should always bear in mind the two separate and distinct theories of appellants, one for relief on the ground of alleged fraud of M. T. Campbell and Jeanette Fensky in connection with the assignments by appellants to Jeanette Fensky of all their interests in the estate of Ferdinand Fensky, and the others as alleged heirs of Jeanette Fensky.

Position of Appellees Merriam, Wellke, Schmidt and Farnsworth.

The general propositions contended for by the above named appellees may be briefly summarized as follows:

(1) The assignments executed by appellants to the widow, Jeanette Fensky, of all their interests in the estate of her deceased husband, Ferdinand Fensky, and the decrees of distribution of Ferdinand Fensky's estate based in part upon said assignments were not obtained by fraud, and are binding upon appellants in this suit.

(2) The interest of Ferdinand Fensky in the Kansas realty covered by the contracts to sell was real property descending under the laws of Kansas to his widow. The effect of said contracts covering property

in Kansas is to be determined solely by the laws of Kansas. Under a line of decisions of the Supreme Court of Kansas commencing as far back as 1870 and constituting "rule of property" in that state said contracts had no effect upon the legal or equitable title of Ferdinand Fensky which remained in him up to the time of his death. These decisions are binding upon this court.

(3) No property belonging to the estate of Ferdinand Fensky was fraudulently or otherwise concealed from appellants, nor were appellants in any way imposed upon.

(4) The judgment against appellants in the case of Pickens v. Campbell, 104 Kansas, 424, 179 Pac. 343, is binding upon appellants and conclusively adjudicated that the sales' contracts (covering only a part of the Kansas realty), constituted realty, and that no fraud was committed upon appellants by M. T. Campbell as the agent of Jeanette Fensky, the predecessor in interest of appellees herein.

(5) Even if appellees had proved sufficient facts to set aside the releases and assignments to Jeanette Fensky and the decree of distribution to her in the estate of Ferdinand Fensky, it would be of no avail to them for not one of the appellants have traced, or can definitely or at all trace, the balance due of his or her alleged interest in the estate of Ferdinand Fensky into the hands of any of appellees.

(6) Conceding, for the purpose of argument only, that any property belonging to the estate of Ferdinand Fensky had been accidentally omitted from the inventories in the administration of his estate, such fact would be of no avail to appellants in view, *first,* of the binding effect of the assignments of *all* the interests in said estate to the widow Jeanette Fensky, and *second,* in view of the usual omnibus clause in the decree of distribution of said estate distributing not only the property therein described, but *all other property belonging to said estate wherever situated,* whether described in the decree or not.

(7) Appellants are barred from any claim based upon the alleged fraud of Campbell and Jeanette Fensky, if any they ever had, by the statute of limitations. (Sub. 4, Sec. 338, C. C. P.)

(8) Appellants are barred from any claim based upon the alleged fraud of Campbell and Jeanette Fensky, if any they ever had, by their own laches.

(9) Appellants are barred from any relief as heirs of Jeanette Fensky by the decree of distribution of her estate. (No intrinsic fraud in connection with the administration of this estate is alleged or claimed.)

(10) Appellants have not and never had any rights as heirs of Jeanette Fensky.

(11) All of the deeds given by Jeanette Fensky to her next of kin were delivered during her lifetime. Neither the property covered by said deeds nor any

of the personal property alleged to belong to said estate actually belonged to said estate, nor did the administrator of said estate fraudulently fail to inventory any of the same.

(12) The alleged relief prayed for by appellants as heirs at law of Jeanette Fensky is barred both by the statute of limitations and by their own laches.

Lastly, that there is no equity in appellants' case.

ARGUMENT.

I.

The Assignments Executed by Appellants to the Widow, Jeanette Fensky, of All Their Interests in the Estate of Her Deceased Husband, Ferdinand Fensky, and the Decree of Distribution of Ferdinand Fensky's Estate Based in Part Upon Said Assignments Were Not Obtained by Fraud, and Are Binding Upon Appellants in This Suit.

The chief element of fraud relied upon by appellants to set aside the assignments executed by them of their interests in the estate of Ferdinand Fensky to Jeanette Fensky, his widow, and the decrees of distribution of his estate to Jeanette Fensky, which were in part based on said assignments, is that Campbell, the Kansas administrator, fraudulently concealed from appellants the existence of the conditional sale contracts of lots in Fensky's Addition in Kansas, and fraudulently omitted said contracts from the personal

property inventory of the estate of Ferdinand Fensky in Kansas, but instead, fraudulently listed the real property covered by said contracts in his inventory *as real estate* belonging to said estate. The balance due upon these contracts aggregated $22,965.75 at the time of the death of the deceased and constituted the great bulk of the property alleged to have belonged to the *Estate of Ferdinand Fensky* and to have been fraudulently concealed from appellants. The other items of property belonging to the widow but alleged to have belonged to the Estate of Ferdinand Fensky and to have been fraudulently concealed amounted to but about $5000.00, in the aggregate, and would not have appreciably increased the undivided one-sixteenth interest of each of appellants, as collateral heirs.

It is obvious therefore that the main point of the case is the effect if any of the contracts for the sale of lots in Fensky's Addition, Topeka, Kansas, upon the title of Ferdinand Fensky to said lots. Until appellants have demonstrated that *under the laws of Kansas* these contracts worked an equitable conversion of the title of Ferdinand Fensky in these lots (many of which had houses on them) into personalty—thereby changing their devolution under the laws of succession—appellants "have not launched their case." If under the laws of Kansas no equitable conversion was worked—and such we submit has been the well established law in Kansas since 1870, amounting to a rule of property—then Ferdinand Fensky remained

the owner of the lots in question at the time of his death, and they descended under the laws of Kansas subject to said contracts, direct to the widow. Sections 2953, 2942, Gen. Stats. Kansas, 1909 (Secs. 20 and 8 of an act concerning Descents and Distribution).

If on the other hand, the contracts had worked an equitable conversion, then Ferdinand Fensky was not the owner of the lots covered by the contrats, but was the owner of the money due thereunder, which, being personalty, descended, under the laws of California, the domicile of Fensky at the time of his death, one-half to his widow and one-half to his brothers and sisters (Subd. 2, Sec. 1386, Civil Code of California).

Appellant's case fails at the outset under either one of the following three views:

First: If, as a matter of law, these Kansas contracts had no effect upon the title of Ferdinand Fensky to the lots covered thereby, or, in other words, did not work an equitable conversion thereof, then appellants' case fails, even if it had been proven that Mr. Campbell had a fraudulent intent in so determining and in acting upon such determination; for since appellants never had any interest therein, any alleged fraudulent intent in regard thereto would be entirely immaterial.

Second: If, on the other hand, an equitable conversion had been worked, since the assignments by appellants to the widow, were negotiated by Mr. Camp-

bell honestly and in good faith firmly believing that Ferdinand Fensky continued to own the legal and equitable title to the Kansas real property covered by these contracts, and that the same, *as realty,* descended direct to the widow, he committed no *fraud* in his alleged concealment of the existence of these contracts; and hence appellants cannot succeed in setting aside the assignments to the widow of their interests in the estate of Ferdinand Fensky, or the decrees of distribution based thereon, on the ground of *fraud*, or on any other ground.

Third: Appellants knew of the existence of said contracts, or had notice of facts which, if pursued with ordinary diligence, would have disclosed their existence; hence there was no concealment of their existence.

The Interest of Ferdinand Fensky in the Kansas Realty Covered by the Contracts to Sell, Was Real Property Descending to His Widow. No Equitable Conversion Was Worked by Said Contracts, Under the Laws of Kansas.

(a) THE FEDERAL DECISIONS ARE A UNIT IN HOLDING THAT THE VALIDITY, CONSTRUCTION AND EFFECT OF EXECUTORY CONTRACTS TO SELL LAND ARE GOVERNED BY THE LAWS OF THE STATE WHERE THE LAND IS SITUATED:

Clarke v. Clarke, 178 U. S. 186;
Olmsted v. Olmsted, 216 U. S. 386;

Central E. M. Co. v. Central Eureka Co., 204 U. S. 266, 272;

De Vaughn v. Hutchinson, 165 U. S. 566;

Brine v. Insurance Co., 96 U. S. 627, 636;

Kenyon v. Mulert, 184 Fed. 825, 107 C. C. A. 63;

Laughlin v. N. Wisconsin Lumber Co., 176 Fed. 772; affirmed, 193 Fed. 367, 113 C. C. A. 291.

In Olmsted v. Olmsted, 216 U. S. 386, 393, the court quoted the following extract from De Vaughn v. Hutchinson, *supra:*

> "It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."

The contracts involved in this case are, in each instance, in the following form:

"Witnesseth, that said party of the first part (F. Fensky), for the consideration hereinafter mentioned, covenants and agrees *to sell* and convey unto said party of the second part (the purchaser), his heirs and assigns, all the following described real estate situated in the county of Shawnee and state of Kansas, to-wit: (Description of property.)

"In consideration of which, said party of the second part covenants and agrees to pay unto the said party of the first part, for the same, the sum of (amount), as follows: (Terms of payment.) And said party of the first part, on receiving said sum and sums of

money, *at the time and in the manner aforementioned*, shall at his own expense execute and deliver to said party of the second part a good and sufficient warranty deed. * * *

"It is further agreed between the parties to these presents that said party of the second part shall pay all taxes or assessments becoming chargeable to or upon said premises after this date; *and if default be made in fulfilling this agreement, or any part thereof, by or on behalf of said party of the second part, this agreement shall, at the option of said party of the first part, be forfeited and determined, and said party of the second part shall forfeit all payments made by him on the same, and such payments shall be retained by said party of the first part in full satisfaction, and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of said premises.* * * *" [Tr. p. 507; italics ours.]

(b) THERE IS NO DOUBT, FROM THE MERE READING OF THE FOREGOING CONTRACT, THAT TIME WAS CONTEMPLATED TO BE OF THE ESSENCE OF THE CONTRACT, AND THAT THE VENDOR RESERVED THE RIGHT OF ABSOLUTE FORFEITURE AND THE RIGHT TO RE-ENTER AND TAKE POSSESSION OF THE PREMISES IN THE EVENT OF ANY DEFAULT ON THE PART OF THE PURCHASER.

Pickens v. Campbell, 179 Pac. 343 at 344;
Drollinger v. Carson, 97 Kas. 502, 505; 155 Pac. 923;
Douglas Co. v. U. P. R. W., 5 Kas. 615.

These very contracts were construed by the Supreme Court of Kansas and the Kansas decisions reviewed

in Pickens v. Campbell, 179 Pac. 343 at 344, from which we quote the following pertinent extract:

> *"It will be observed that the form of contract used was not one of present sale; it was one to sell. No obligation on the part of the vendor to convey arose except on receiving the stipulated sums of money, at the time and in the manner specified.* In case of default, the right to forfeit and to re-enter was expressly reserved. The forfeiture clause is identical with that appearing in the contract considered in the case of Drollinger v. Carson, 97 Kan. 502, 505, 155 Pac. 923. It was there said that such provisions are sometimes held to make *time of the essence of the contract*, citing 39 Cyc. 1369, 1370. It was not necessary to declare that such was the effect in that case, because, after default of the vendee, the vendor made time essential by dmanding payment within a stated period, under penalty of forfeiture. *That is just what the contract under consideration did at the beginning of the relations between the vendor and the vendee. Title was withheld; performance by the vendee at the time stipulated was a condition precedent to the acquisition of title; default entailed forfeiture of payments already made and right of possession; the vendor was then at liberty to re-enter or to invoke the remedy of ejectment; and insertion of the formula, 'Time is of the essence of this contract,' would have been superfluous."* (Italics ours.)

In the case of Douglas Co. v. U. P. R. W., 5 Kas. 615 (cited in Pickens v. Campbell), the contract did not contain a statement that time of performance by

the vendee was an essential element, but the court said:

> "It is true that the company had made a conditional purchase of this land, but they were not to receive the patent therefor until all the conditions of the purchase were fulfilled; and if any one of the conditions were violated * * * they were to forfeit all their right, title and interest in and to said land, and it was then to be sold to other parties. It will be perceived from the very nature of this contract, and from the character of the parties to the same, that *time* was an essential ingredient of the contract. The contract was purely executory, and it was not intended that the government should be bound to execute its part of the contract, by parting with any portion of its land, unless the railroad company should fulfill every portion of its part of the contract first—and strictly within the time stipulated. It was not intended to have any law suits over the matter." (P. 521.)

The Supreme Court of Kansas in discussing the contracts here involved said:

> *"In this case most of the lots were sold for small payments to be made during considerable periods of time, and it is quite clear that Ferdinand Fensky intended to forestall lawsuits by requiring purchasers to accept contracts which provided for strict performance, under penalty of forfeiture. The result is, the contract is identical in all its legal aspects with the contract considered in Brown v. Thomas, Sheriff,* 37 Kan. 282,

15 Pac. 211, *and the vendor continued to be the owner of the land.*"

(Pickens v. Campbell, 179 Pac. 343, 344-5; see stipulation and the typical contract set out at pages 507-8 of the transcript providing for $12.00 down and $12.00 per month until $968.55 should be paid, which would require nearly seven years.)

(c) UNDER THE LAWS OF KANSAS, IT HAS BEEN A WELL-SETTLED RULE OF PROPERTY SINCE 1870 THAT CONTRACTS TO SELL LAND, SUCH AS ARE HERE INVOLVED, WHEREIN TIME IS OF THE ESSENCE AND THE VENDOR RESERVES THE RIGHT OF FORFEITURE AND TO RETAKE POSSESSION IN CASE OF ANY DEFAULT BY THE VENDEE, DOES NOT OPERATE AS AN EQUITABLE CONVERSION SO AS TO VEST IN THE VENDEE THE LEGAL OR EQUITABLE TITLE TO THE LAND, BUT THE ENTIRE TITLE, LEGAL AND EQUITABLE, REMAINS IN THE VENDOR UNTIL THE VENDEE HAS COMPLETELY PERFORMED.

Pickens v. Campbell (Kan.), 179 Pac. 343 (decided Mar. 8, 1919; rehearing denied Apr. 17, 1919);

Douglas Co. v. U. P. Ry. Co. (decided in 1870), 5 Kan. 615;

Brown v. Thomas, 37 Kan. 282 (appealed from Shawnee County, and decided in 1887) 15 Pac. 211;

Williams v. Osage Co. (decided in 1911), 84 Kan. 508, 114 Pac. 858.

Appellants herein were also the appellants in Pickens v. Campbell, *supra,* and there litigated, without success, the very question which they are again litigating in this case. It was there held, based upon a long line of Kansas decisions amounting to a "rule of property" in that state, that these precise contracts *"were not personal property,"* and, accordingly, that *"they had no place in the personal property inventory"*; that the land covered by the contracts descended as realty entirely to the widow; that *the motives of M. T. Campbell in omitting them from the inventory were good* (p. 344) and that he acted honestly, in good faith, and was guilty of no fraud whatsoever upon appellants.

This decision was arrived at after the same case had previously been before the Supreme Court of Kansas (98 Kan. 518, 159 Pac. 21), where the court fully recognized that "ordinarily, the right to the purchase of land contracted to be sold but not conveyed at the time of the vendor's death, passes to his personal representative and not to his heirs." In this earlier opinion, it was accordingly held that the bill of complaint stated a cause of action; but as the Kansas court points out, in the later opinion, "the precise nature of the contracts was not disclosed by the petition, and from certain ambiguous statements, it was inferred that *notes* were given for the purchase price." At the trial such proved not to be the case, in each instance the only writing consisting of the contracts themselves now before this court.

We have therefore a determination based on a long line of Kansas decisions, by the court of last resort in Kansas of the status of this precise Kansas real estate as affected by these very contracts, for the purposes of devolution under the laws of succession in that state, and this determination was arrived at in an action instituted by these very appellants against the personal representative in Kansas of Ferdinand Fensky, deceased.

In the case of Douglas County v. Union Pacific Railway Company, 5 Kansas 615 (cited in Pickens v. Campbell), the contract for the sale did not *expressly* make time of the essence of the contract. The court recognized the equitable doctrine that when land is sold on credit and a deed is to be made when the purchase money is paid, the land at the time sale is made becomes the vendee's and the purchase money the vendor's. But it is said in the opinion:

> "*This maxim never applies where time is of the essence of the contract and where the land is subject to absolute forfeiture on failure of some conditions of the sale being performed. * * * In such a case no title, legal or equitable, passes until every condition of the sale is performed.*"

In Brown v. Thomas, the contract (as stated in Pickens v. Campbell, 179 Pac. 343 at page 345), was "identical in all its legal aspects" with the contract in the case at bar. The form of the contract is set out in full in the opinion. The effect of this contract is thus stated by the court:

"Horton, C. J. *The agreement for the sale of the real estate described in the petition confers neither the legal nor the equitable title upon Davison.* It is simply an agreement *to sell* real estate *upon conditions precedent,* and sets forth a conditional sale only. In the contract, it is stipulated, in substance, that *time is the essence thereof; that the failure to perform any of its conditions shall render the contract null and void; and that, by such failure, the party holding under the contract shall forfeit to the other party all the money paid thereon,* and all improvements made on the premises, and all right to compensation therefor, and that he shall cease to have any interest therein."

"The maxim that equity considers that when land is sold on credit, and the deed is to be made when the purchase money is paid, that the land at the time of the purchases became the vendee's, and the purchase money the vendor's; that the vendor becomes the trustee of the vendee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase money,—is not applicable here."

"The legal title has not passed to him, because no deed or other conveyance has yet been made; and the equitable title has not passed, because the land has not been paid for, and because, on account of the provisions for forfeiture, it is clearly the intention of the parties, as indicated in the contract, that such title shall not pass until the land is paid for.". (15 Pac. 213.)

In Williams v. Board of Commissioners, 84 Kan. 508, 114 Pac. 858, (distinguished on its facts in Pickens

v. Campbell) the contract provided that: "If the purchaser failed to make the deferred payments within a *reasonable time after the same became due and payable,* then the contract should 'cease and terminate and be forever void.'" The court pointed out that "this is not making time of the essence of the contract." (114 Pac. 861). This is manifestly correct for the agreement allowed the vendee a *"reasonable time"* after the due date within which to avoid a forfeiture. The court, in discussing the doctrine of equitable conversion, quoted with approval from Douglas County v. U. P. Rwy. Co., 5 Kan. 615, as follows:

> *"For this maxim never applies where time is of the essence of the contract, and where the land is subject to absolute forfeiture on failure of some condition of the sale being performed;* for there is no necessity in such a case for courts of equity to resort to any such fiction, and equity never looks upon a thing as done which ought not to be done, nor in favor of any party, except one that has a right to pray that it may be done. *In such a case no title, legal or equitable, passes until every condition of the sale is performed; and, if such condition is not performed at the exact time that it should be performed, no title ever passes."*

The court then said:

> "The distinction here made illustrates the difference between this case and Brown v. Thomas, *supra.* In the latter case time was made of the essence of the contract, and *all rights of the purchaser were immediately forfeited upon the failure*

> *to pay at the exact time.* On the same theory in the Douglas county case it was held that the *purchaser at the time of the execution of the contract acquired no title, legal or equitable. In the case at bar, however,* the contracts may be properly designated as contracts *of sale* and not contracts *to sell."*

Although the decision of the supreme court of Kansas in Pickens v. Campbell, 179 Pac. 343, was rendered after the rights of the parties to the contracts here involved occurred, manifestly it did not establish any new doctrine. *The cases, which are cited by the supreme court of Kansas, dating back to 1870, have never been overruled in that state, but, on the contrary, establish a well-settled rule of property in contemplation of which it is to be presumed that the contracts here involved were entered into.*

In support of this contention we need only quote the following extract from the decision of the supreme court of Kansas in Pickens v. Campbell:

> "The plaintiffs say the Brown case should be overruled. *The court is entirely satisfied with the decision in the Brown case; but, if it were not, it would hesitate to overturn a rule of property first announced in the Douglas County case in 1870, and recognized as late as 1911 in the Osage County case."*
>
> 179 Pac. 343, 345.

The court had previously pointed out that the contract in the Brown case "is identical in all its legal aspects" with the Fensky contracts here involved.

Judge Bledsoe, before whom this case was tried in the lower court, investigated the Kansas decisions and correctly came to the same conclusion, as is shown by the following extract from his opinion:

> "It is stated (Pickens v. Campbell, 179 Pac. 343, 345) and upon an independent investigation seems to be true, that through a long period of years, the consistent ruling of the Kansas courts has been to the effect that in a case such as this,—where notes for the purchase price were not given, where time, either expressly or impliedly, was made of the essence of the contract, and where the right was given to the vendor upon a default on the part of the vendee immediately to declare a forfeiture and retake possession of the property agreed to be conveyed,—there is no conveyance of the legal title and no equitable conversion as is sought to be taken advantage of herein. Mr. Campbell then was entirely right in his attitude. Being right, fraud, intentional deceit, conduct approximating criminality, on his part, may not now be successfully charged against him." [Tr. pp. 196-7.]

All of the Kansas cases cited by appellants are distinguishable from the case at bar. The cases of Gilmore v. Gilmore, 60 Kan. 606, 57 Pac. 505, and Williams v. Osage County, *supra,* are *distinguished and disposed of on their facts in Pickens v. Campbell,* 179 Pac. 344, 345. In Jones v. Hollister, 51 Kan. 310, Courtney v. Woodworth, 9 Kan. 443, Usher v. Hollister, 58 Kan. 43, and Burke v. Johnson, 37 Kan. 337, notes were given for the purchase money, there was *no forfeiture*

clause, and *time was not of the essence of the contract.* In Campbell v. Kansas Town Co., 69 Kan. 314, *time was not of the essence, and the contract contained no forfeiture clause.* In Laughlin v. Braley, 25 Kan. 147, it does not appear that time was of the essence, or that the contract contained a forfeiture clause. All of the Kansas decisions on this subject are also reviewed in the decision of the district court of Shawnee, Kansas, set out in full at pages 703 to 715 of the transcript and the cases cited by appellants are clearly distinguished.

(d) THE RULE OF PROPERTY LAID DOWN IN THE SERIES OF KANSAS CASES, BEGINNING IN 1870 WITH THE DOUGLAS COUNTY CASE AND ENDING WITH THE SECOND CASE OF PICKENS V. CAMPBELL, THAT CONTRACTS SUCH AS ARE HERE INVOLVED DO NOT OPERATE TO DIVEST THE OWNER OF HIS LEGAL OR EQUITABLE TITLE, IS BINDING UPON THE FEDERAL COURTS.

The rule is well stated in the following extract from Bucher v. Cheshire R. R. Co., 125 U. S. 555, 583:

> "It is also well settled that where a course of decisions, whether founded upon statutes or not, have become *rules of property* as laid down by the highest courts of the state, *by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that state by the federal courts.*"

In Burgess v. Seligman, 107 U. S. 20, at p. 33, it is said:

> "The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results

would be anomalous and inconvenient but for the exercise of mutual respect and deference. *Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is.*"

In Kuhn v. Fairmont Coal Co., 215 U. S. 349, practically all of the previous decisions of the court are reviewed; at the conclusion of which the court stated the rule, as applied to the case at bar, to be as follows:

"We take it, then, that it is no longer to be questioned that the federal courts in determining cases before them are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws the jurisdiction of the federal court is an independent one, not subordinate to but co-ordinate and concurrent with the jurisdiction of the state courts. 2. *Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state.* 3. But where the

law of the state has not been thus settled, it is not only the right but the duty of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved,* then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. *But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt."*

215 U. S. 360.

The case at bar comes exactly within the second rule above declared.

In Kuhn v. Fairmont Coal Co., *supra,* the contract involved was a deed to real estate, the question involved in the case was not the *effect* of the contract or deed upon the *title* to the property. The *single decision* of the state court relied upon there as being binding upon the federal court was decided *after* the deed was executed, and after the injury complained of was sustained, and after the action in the federal court was instituted, and *the point then decided in the state court had not been previously adjudged by the supreme*

court of that state (p. 356). What the decision would have been in a situation such as is involved in this case is shown by the following pertinent extract from the opinion:

> *"If, before the rights of the parties in this case were fixed by written contract, it had become a settled rule of law in West Virginia, as manifested by decisions of its highest court, that the grantee or his successors in such a deed as is here involved, was under no legal obligation to guard the surface land of the grantor against injury resulting from the mining and removal of the coal purchased, a wholly different question would have been presented."*
>
> 215 U. S. 361.

In Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221 (writ of *certiorari* denied in 191 U. S. 567), cited by appellants, the rule is correctly stated as follows:

> "Now, it is a well-settled doctrine that *the proper interpretation* of a private contract presents a question of general law, concerning which the federal courts are entitled to express an independent judgment, *unless the contract is one relating to the sale or conveyance of real or personal property, and it contains words or phrases that, in virtue of local decisions, have acquired a definite meaning, and have thus become rules of property within the state. When such is the case the federal courts will interpret a contract as the state courts would interpret it.* Jackson v. Chew, 12 Wheat, 153, 6 L. Ed. 583; Suydam v. Williamson, 20 How. 427, 15 L. Ed. 978; Burgess v. Seligman, 107 U. S. 20,

2 Sup. Ct. 10, 27 L. Ed. 359; Bucher v. Cheshire R. Co., 125 U. S. 555, 584, 8 Sup. Ct. 974, 31 L. Ed. 795."

123 Fed. 226.

We fail to see how either this case or any of the other cases cited by appellants in their brief are of any consolidation to them, for the contract involved here is one relating to the sale of real property in Kansas, and the question involved here is *the effect of these contracts, if any, upon the legal and equitable title of Ferdinand Fensky to the Kansas land covered thereby.* These contracts do contain clauses which, by "virtue of a series of local state decisions," beginning with the Douglas County case, decided in 1870, which, as stated in the case last cited, "have acquired a definite meaning" and give to the contract a well-settled and definite effect, and "have thus become rules of property" within the state of Kansas. Such being the case, the federal courts will give the contracts the same effect as would be given to them by the supreme court of Kansas. There are no federal decisions cited by complainants, or which can be cited by complainants, to the contrary.

In Story's Equity Jurisprudence (Vol. II, par. 1107) the learned author says:

> "It is the exclusive province of the courts of the state of the *situs* of the property to determine its ownership, and its devolution and transfer and *whether or not there has been a conversion of the property from one sort to another. This is essen-*

tially so from the very nature of things, or else the state would have certain classes of property, within its boundaries completely subject to the caprice and desires of non-residents and thus render nugatory its laws enacted for the purpose of protecting its own citizens and their property rights."

and cites Clarke v. Clarke, 70 Conn. 483, 40 Atl. 111, affirmed in 178 U. S. 186, 44 L. Ed. 1028 (hereinbefore cited) and Holcomb v. Wright, 5 App. Dist of Col. 76, 86. In the latter case the rule is thus stated:

"The question of sale and conversion of real estate, situate in any of the states of the Union, must depend upon the law of such state, and not upon the law of another jurisdiction."

5 App. Dist. of Col. p. 86.

This court upon the previous appeal of the case at bar, after referring to and following the first decision of Pickens v. Campbell, 98 Kan. 518, 159 Pac. 21, which likewise arose solely upon the complaint stated: *"This decision disposes of these questions so far as they relate to the estate in Kansas,* and is persuasive as to the rules applicable to the estate in California." (Italics ours.)

Decisions cited by appellants laying down what the rule is in other states, or what the rule is in the federal courts where there have been no previous decisions in the state, or where a single state decision is relied upon, rendered, perhaps, after the accrual of the rights involved, or where the earlier state decisions under which

the rights accrued have been overruled by a later state decision, or where the question to be decided is one of general jurisprudence,—are not in point; for such is not the situation in the case at bar.

(e) EVEN IF APPELLANTS COULD OVERCOME THE IMPASSABLE BARRIER CREATED BY THE "RULE OF PROPERTY" LAID DOWN BY THE KANSAS DECISIONS, STILL AN EQUITABLE CONVERSION OF REALTY WAS NOT WORKED BY THE CONTRACTS EXECUTED BY FERDINAND FENSKY, EVEN UNDER THE DECISIONS FROM OTHER JURISDICTIONS CITED BY APPELLANTS, BECAUSE HE HAD NOT THE ABSOLUTE OWNERSHIP OF THE LAND, AND THE CONTRACTS WERE NOT THEREFORE SUCH CONTRACTS AS EQUITY WILL SPECIFICALLY ENFORCE.

The Kansas law (section 2942, Gen. Stats. Kansas, 1909) gives the wife a *present* one-half interest in value in all realty to which at any time during marriage the husband acquires a legal or equitable title, which has not been sold on execution or other judicial sale, and of which "the wife" 'has made no "conveyance," providing the wife was *at any time* a resident of the state of Kansas.

In McKelvey v. McKelvey, 75 Kan. 325, 89 Pac. 663, 121 Am. St. Rep. 435, this section is construed as follows:

> "The interest which the statute gives to the wife in the real estate of her husband during his life is not easily classified or defined. Because of this

difficulty it has been thought by some to be in its nature an inheritance, and such a suggestion may be found in some of the opinions of this court. But practically *the entire trend of the decisions of this court is to treat it as a present existing interest —one which the wife may protect by an appropriate action during the life of the husband and against his wrongful acts:* Busenbark v. Busenbark, 33 Kan. 572, 7 Pac. 245; Flanigan v. Waters, 57 Kan. 18, 45 Pac. 56.

The wife's interest does not depend for its inception upon the death of the husband, as an inheritance would, but springs into existence by operation of law upon a concurrence of seisin and the marriage relation. *This interest, equal to one-half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, and which the husband had not conveyed at a time when his wife was not, or never had been a resident of this state,* and not necessary for the payment of his debts, upon the death of the husband shall, under the direction of the probate court, be set apart by the executor as her property. And the only control exercised by the probate court or the executor or administrator over the wife's interest in the real estate owned by her husband at the time of his death is to ascertain its value and set it apart to the widow—not as an heir of her deceased husband, but as her separate and absolute property in fee simple. *And since this interest does not come to her by inheritance, it is not a bar to her recovery that her husband parted with his title in such*

a fraudulent manner that neither he nor his heirs can recover it."

121 Am. St. Rep. 437-8.

See also:

Munger v. Baldridge, 41 Kan. 236, 21 Pac. 159, 161-3;

Williams v. Wessels, 94 Kan. 71, 145 Pac. 856, 858.

In each of the various contracts, which it is stipulated were identical in form [Tr. p. 507], the agreement only purports to be made between "F. Fensky" as the "party of the first part" and the various vendees as parties of the second part, and is executed solely by those parties. Each of the contracts contain mutual and dependent stipulations between those parties alone, and on its face, each is a complete agreement between them. Jeanette Fensky was not made a party to and did not sign any of these contracts, but signed a statement at the end thereof after the signatures of the vendor and vendee, as follows:

"I hereby consent to the within agreement. Jeanette Fensky." [Tr. pp. 509-510.]

The relationship of Jeanette Fensky to F. Fensky nowhere appears upon the face of any of the instruments.

It has been repeatedly held that a contract in writing purporting to be between two persons, not unilateral in its covenants but containing mutual and dependent stipulations to be by the named parties severally performed, which is signed by them and also by a third

person in such a manner as not to indicate the capacity in which the latter signs, that the third person is not a party to the agreement, parol evidence will not be admitted to show that he signed the contract intending to be bound either as principal or surety, and no action can be maintained either by or against him upon it.

Blackmer v. Davis, 128 Mass. 538.

It is there pointed out that it is immaterial that the third person is similar in name to one of the signing parties. See also:

Shepard Company v. Freeman, 40 Mont. 144, 105 Pac. 484,

where the third party signed a similar clause to that in the case at bar, reading "We both consent to the above contract." To the same effect see:

Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27, 29;

Carson v. National Life Ins. Co. (N. C.), 77 S. E. 353, 354-5;

Shriner v. Craft, 166 Ala. 146, 51 So. 884, 139, Am. St. Rep. 19;

Fuchs v. Block, 156 Ill. App. 482;

Alcazar etc. Co. v. Pereira, 194 Ill. App. 507;

Evans v. Conklin, 24 N. Y. Supp. 1081.

This doctrine is considered with especial favor in cases wherein the widow's rights of dower in the estate of her husband is in question. See:

Bruce v. Wood, 1 Metcalf 542;

Carson v. National Life Ins. Co. (N. C.), 77 S. E. 353, 354-355.

And the rule applies with even a greater degree of force to an action for specific performance upon a contract so signed, for an action cannot be maintained for specific performance where the agreement is uncertain as to parties.

Hissan v. Parrish, 41 W. Va. 686, 24 S. E. 601, 602;

Myers v. Metzger, 63 N. J. Eq. 779, 52 Atl. 274, 275.

It is plain, therefore, that Ferdinand Fensky not having the absolute ownership of the land covered by these contracts, but his wife during his lifetime having an interest in all of said real property equal to one-half the value thereof, no contract made by said Ferdinand Fensky, though it might bind him to the extent of his interest in the land, could be specifically enforced against an unwilling purchaser.

Pomeroy Eq. Juris. (4th ed.), Sec. 2178, 2256;
Ellis v. Treat, 236 Fed. 120; 149 C. C. A. 330;

It cannot be contended that the interest of Mrs. Fensky could be defeated upon the doctrine of estoppel. There could be no estoppel by deed, for as we have demonstrated there was no sufficient deed or contract. There could not be estoppel *in pais,* for the doctrine does not apply as to a matter of fact "equally open to the knowledge of the parties," and it is clear that the purchaser in each of these contracts must have known of the wife's statutory interest in the property. Bige-

low on Estoppel (6th ed.), p. 604. Furthermore, whether or not there could be said to have been an estoppel on the part of Mrs. Fensky to dispute her liability as against the vendees under the various agreements, that defense would be a *personal* one which the *vendees alone* could set up. It could not be set up as *against* the purchaser. Bigelow on Estoppel (6th ed.), p. 710. It therefore follows that the contracts in question could not operate as an equitable conversion of the property. As stated by Pomeroy in his work on Equity Jurisprudence:

> "In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will specifically enforce against *an unwilling purchaser.*"
>
> Pomeroy's Eq. Juris. (14th ed.), Sec. 1161.

To the same effect see:

Wittingham v. Lightite, 46 N. J. Equity 429, 19 Atl. 611;
Lunsford v. Jarrett, 11 Lea 192.

(f) As still another barrier to appellants' theory, the statutes of Kansas defining the interest of the wife in the estate of her deceased husband contain the mandatory requirement that one-half the real property be set apart to her as real estate, and preclude the doctrine of equitable conversion.

The statutes of Kansas do not permit the theory of equitable conversion where the statutory interest of

the wife is involved. The provision defining the wife's interest is as follows:

> "*One-half* in value of all the real estate in which the husband *at any time during the marriage,* had a legal or equitable interest which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, *and of which the wife has made no conveyance* shall, under the direction of the probate court, *be set apart by the executor as her property in fee simple* upon the death of the husband, if she survives."
>
> Comp. Laws of Kansas 1885, Ch. 33, Sec. 8.

(This statute is in addition to Sec. 20 of the same act providing that all the real property descends direct to the widow where there are no children.)

This statute, it will be noted, applies to real estate in which the husband may have had an interest "at any time during the marriage." Now, in the instant case, the wife, it has been demonstrated, was not a party to the agreements in question, and in any event she certainly cannot be said to have made a *"conveyance"* of the property. The property was clearly real estate in which the husband at some time "during the marriage" had an interest, and therefore, in compliance with the clear "mandate" of the statute, one-half of that property must *"be set apart* by the executor as her (Mrs. Fensky's) *property in fee simple."* Even if it be assumed, for the sake of argument only, that the proportion set apart would be subject to the contracts executed by her husband, yet it would be "set apart"

to her *as real property* "in fee simple." The executor would be required to inventory, set apart and account for it as real estate, and the fiction of equitable conversion could not, in the face of the plain language of the statute, be indulged in to defeat her interest. If set apart to the wife as real property, it is submitted the property must *for all purposes* of devolution be stamped with that character.

CAMPBELL, IN HIS NEGOTIATIONS WITH APPELLANTS FOR THE PURCHASE OF THEIR INTEREST IN THE ESTATE OF FERDINAND FENSKY, WAS NOT ACTING FOR HIMSELF OR AS ADMINISTRATOR, BUT OPENLY AND AVOWEDLY AS AGENT FOR JEANETTE FENSKY, THE WIDOW, WHO WAS A CO-HEIR WITH APPELLANTS. THEREFORE THEY WERE DEALING AT ARMS' LENGTH AND NOT AS TRUSTEE AND BENEFICIARY.

Appellants, realizing that they have absolutely failed to prove any fraud on the part of Campbell or Mrs. Fensky toward them, ask the court to *presume* fraud by reason of their claim that the fiduciary relationship of trustee and beneficiary existed between Campbell as administrator and themselves as heirs, and that the burden of proof is upon appellees, as the successors in interest of Mrs. Fensky for whom Campbell was acting, to affirmatively show that he did not commit any fraud, but acted openly and honestly. Appellees submit that, if such were the law, that such burden has been met. But the fallacy of this contention is made

at once apparent by the fact that *Campbell was not acting as administrator, but openly and avowedly as agent for Mrs. Fensky, a co-heir, in his negotiations.* Clearly, the relationship between one heir and another is not that of trustee and *cestui que trust. Heirs in buying out the interest of each other deal with each other at arms' length.* This is true whether they act directly or through an agent. Hence Campbell, when *avowedly acting as agent* for one of the heirs in dealing with the other heirs, was dealing at arm's length, just as if the heirs were dealing direct with each other.

Pickens v. Campbell, 179 Pac. 343, 104 Kan. 425;
Herron v. Herron, 71 Iowa 428, 32 N. W. 407;
Elliott v. Higgins, 83 N. C. 459;
Barker v. Barker, 14 Wis. 142.

In Herron v. Herron, *supra,* the administratrix purchased the interest of the father of the deceased who lived in Ireland, upon her own behalf. The property was situated in Iowa. The father was ignorant of the value thereof and negotiated with the defendant, who, by fraud and the fraud of her relatives, misrepresented its value ($12,000) and induced him to sell it to her for $1500. The action was brought by the father for the cancellation of the deed, urging that the defendant's position as administratrix created a fiduciary relationship between the parties. But the court held otherwise, saying:

"But clearly, this position is not tenable. Defendant did not occupy a position of trust or spe-

cial confidence towards plaintiff. She did not deal with his attorney in her capacity as administratrix of the estate. On the death of John Herron, the real estate of which he was seized descended in equal shares to plaintiff and defendant. Her interest in the property was a personal interest. In her representative capacity she had no interest whatever. It was a case of tenants in common dealing with each other with reference to the common estate. Neither of the parties was charged with the duty of protecting the rights or guarding the interest of the other in the property. They stood upon an equality, and *clearly there can be no presumption of unfairness or fraud in the transaction.*" (Pages 407-8.)

It was held in Elliott v. Higgins, *supra*, that:

"where an administrator in the settlement with the distributees of the estate gave his individual note for the balance due them, that such note is not a debt created while acting in a fiduciary capacity within the meaning of Rev. St. U. S., sec. 5117, exempting from discharge in bankruptcy incurred by the bankrupt while acting in any fiduciary capacity."

In Pickens v. Campbell, 104 Kan. 425, 179 Pac. 343, the supreme court of Kansas quotes with approval the following statement by the trial court:

"Aside from any facts shown in evidence as to his (Campbell's) uprightness, *this court must presume under the well known rules of law applying to fraud that he was honest and that his dealings were in good faith.*" (Italics ours.)

None of the cases cited by appellants in their attempt to establish that a fiduciary relationship existed between the appellants and Campbell, who was acting openly and avowedly *as agent for Mrs. Fensky* and not *as administrator* in negotiating on her behalf for the purchase of their interests in the estate, are in point. The case of Michoud v. Girod, 45 U. S. 503 (4 How. 503), was a case where the executors on their own behalf, but through other persons, purchased property *belonging to the estate*, thereby placing themselves in the *dual position* of acting both for the estate as sellers and themselves as purchasers. That situation, however, does not exist where one heir is selling his or her interest in an estate to another heir.

It is to be noted that the quotation from this case, and from the other cases cited, is to the effect that an executor or administrator is "a trustee for the next of kin, legatees *and creditors*," which makes it clear that the word "trustee" was used loosely and in a very large and broad sense, and not in such a sense as to create a fiduciary relationship, for clearly no fiduciary relationship exists between an administrator and *creditors* of the estate, for otherwise every settlement of the claim of any particular creditor would logically be open to the claim now made by appellants that it is presumed to be fraudulent, and that the burden would be on the administrator to show that the settlement was a fair and just one, etc. Such loose general statements refer only to the relationship between the administrator and *the property of the*

estate in his possession for the safe custody and disposition of which he is responsible, and which he cannot purchase at his own sale. That is quite different from the situation where he, *as an heir,* or as the open and avowed agent of an heir, is negotiating for the purchase, not of any particular property belonging to the estate which he holds the physical custody of, but of the undivided interest of *one of the heirs* in the estate. In such a case he does not act both as buyer and seller.

This is the view adopted in the two decisions of the supreme court of Kansas in Pickens v. Campbell, 159 Pac. 23, and 179 Pac. 343, at 345-6, and by District Judge Bledsoe. We quote the following from the opinion of Judge Bledsoe:

> "In all that Campbell had to do in the matter of buying out the respective interests of the collateral heirs, *he was obviously acting as the agent of Mrs. Fensky* and entitled to deal, and is now to be considered as having dealt, at arm's length with those whose interests he was seeking to purchase for his principal. Mrs. Fensky herself might with propriety have been appointed administrator of the estate in Kansas, and in such capacity could, again with the utmost propriety, have sought to purchase and actually have purchased, the interests of the other heirs. In so doing, however, and in the conduct of the negotiations with the heirs incidental thereto, she would have labored under *no such fiduciary relation with respect to the purchase so made, as to cause the court to scrutinize her conduct in relation thereto*

with that nicety that is made use of when a fiduciary is dealing in his trust capacity."

There being no fiduciary relationship existing, the burden is clearly upon appellants to prove their charges of fraud. Fraud is not to be presumed.

Braddock v. Loucheim (C. C. A.), 87 Fed. 287;
Wright v. Grover, 27 Ill. 426;
Ferguson v. Little Rock Trust Co., 99 Ark. 45, 137 S. W. 555;
Ruby Co. v. Jamison, 136 S. W. 909, 910.

Charges of fraud must be clearly made out.

Braddock v. Loucheim, *supra.*

Lapse of time, particularly where the parties to the alleged fraud are dead, operates and adds to the presumption in favor of innocence and against the imputation of fraud.

Prevost v. Gratz, 6 Wheat. 481.

THE PURCHASE BY THE WIDOW OF THE INTERESTS OF APPELLANTS IN THE ESTATE OF FERDINAND FENSKY WAS IN THE NATURE OF A FAMILY SETTLEMENT OR COMPROMISE OF SAID ESTATE. SUCH CONTRACTS ARE HIGHLY FAVORED BY COURTS OF EQUITY, AND WILL NOT BE LIGHTLY SET ASIDE.

The rule is well stated in the following extract from Burnes v. Burnes, 132 Fed. 485, at p. 494:

"Whether the settlement was what a court of equity would have decreed is not the question.

It was an agreement of settlement, and was supported by a consideration. It was a family settlement, and such settlements are seldom corrected or canceled. In 2 Pom. Eq. §850, it is said:

'Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all the parties, instead of ascertaining and enforcing their mutual rights and obligations, which are yet undetermined and uncertain, intentionally put an end to all controversy by a voluntary transaction in the way of a compromise, are highly favored by courts of equity. They will not be disturbed for any ordinary mistake either of law or of fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without a judicial controversy.'

For reforming or canceling a contract, courts require stronger proofs in cases of family settlements than in any other, and will even hunt for reasons to sustain such contracts, to the end that family secrets, disputes, and wranglings may be kept from the gaze of a curious and gossiping public. The law is stated by Justice Story, in his work on Equity (section 132):

'There are cases of family compromises, where upon principles of policy, for the honor of peace of families, the doctrine sustaining compromises has been carried further; and it has been truly remarked that in such family arrangements the court of chancery has administered an equity which is not applied to agreements generally. *Such compromises*, fairly and reasonably made to save the honor of a family, as in case of suspected

> illegitimacy, to prevent family disputes and family forfeitures, *are upheld with a strong hand*, and are binding when in cases between mere strangers the like agreements would not be enforced.' "

That case was affirmed by the circuit court of appeals (8th cir.), 137 Fed. 781, where the rule is stated as follows:

> "For obvious reasons of public policy, compromises of conflicting claims by family settlements are encouraged by the courts, and they may not be avoided or disregarded for mere inadequacy of consideration, or except upon clear and convincing proof of grave fraud or mistake. Stapilton v. Stapilton, 1 Atk. 2; 2 White & Tudor's Lead. Cas. in Equity, pt. 2, p. 920; Supreme Assembly v. Campbell, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601; *In re* Palethorp's Estate, 168 Pa. 101, 31 Atl. 885."
>
> 137 Fed. 801.

See also:

> Martin v. Martin (Ark.), 135 S. W. 348, and cases therein cited.

(3) *The assignments from appellants to Jeanette Fensky were procured by Campbell in good faith and with the honest belief that the interest of Ferdinand Fensky in the lots covered by said contracts constituted realty, and therefore were not obtained by fraud.*

Assuming, for the purpose of argument only, that a fiduciary relationship had existed between Campbell and appellants, and that the burden was upon the

defendants to show the absence of fraud in Campbell's dealings with appellants (which is not the case),—that burden, we submit, has been met by the preponderance of the evidence in this case, to the effect that Campbell acted honestly and in good faith and without any fraud upon appellants.

We quote the following statement and extracts from the correspondence between Campbell and Goodrich, the attorney administering the estate of Ferdinand Fensky in California, which is set forth in the opinion in Pickens v. Campbell, 179 Pac. 343, and which shows, as is there held, that Campbell at all times, not only honestly, but correctly, believed that Ferdinand Fensky remained the owner of the lots covered by the sales contracts, and that such lots went to the widow as realty, and that he was not actuated by any fraudulent motives:

> "The record in this case vindicates not only Mr. Campbell's ability as a lawyer, but the good faith of his conduct and his sagacity as a business man. On September 4, 1903, John V. B. Goodrich, an attorney at San Pedro, Cal., wrote Mr. Campbell a letter advising him of Mr. Fensky's death and intestacy while resident in California, stating that Mr. Goodrich had been employed by Mrs. Fensky to settle the estate, and on behalf of Mrs. Fensky requesting Mr. Campbell to act as administrator of the portion of the estate situated in Kansas. On September 8th, Mr. Campbell replied, consenting to act as administrator. He was already familiar with the Fensky interests here and at the threshold of the contemplated

administration was the question of what was real estate, descending to the widow according to the law of Kansas, free from interference by the administrator, unless needed for payment of debts, and what was personal property, to be inventoried and administered, but finally to be distributed according to the law of California. So far as known, Mr. Campbell had never even heard of Mr. Goodrich before, and, writing, as one lawyer to another, he said:

'Of course, all his real estate here will go to her under our statute, but I suppose all his personal property, which will include all notes and mortgages, will descend under the law of California. Is not that your understanding?

'An administrator here is quite necessary in view of the many mortgages and land contracts he left. * * * and, if the administrator can act in the capacity of agent generally for her, it would simplify matters and perhaps be less expensive. * * *

'Give me your views of Mrs. Fensky's relation to the land and lot contracts for deed; if she is now the sole owner of the lands, and I think (without investigating the question) that she is, ought she not either to make new contracts in her own name, or give deed and take back mortgages for balances of purchase money? * * *

'Is it at all probable that the brothers and sisters will make any claim to the contracts for deeds for property here? As soon as I am appointed administrator I will be besieged, and I want to know your view on some of these important questions before expressing my opinion.'

On September 14th, Mr. Goodrich replied, and among other things said:

'You ask me to give my views of Mrs. Fensky's relation to the land and lot contracts for deeds. My opinion is that Mrs. F., under your laws, is now the sole owner of said lands. * * *

'In relation to the brothers and sisters making any claim to the contracts for deeds, Mrs. F. says that she cannot tell what they will do; but so far as the personal property is concerned, and also the land here, I have advised her to compromise with and get their receipts in full for what interest they may have in the estate. If you have any suggestions to make along the line of such a compromise, please do so, and assist us in bringing the same about.'

On September 18th, Mr. Campbell wrote Mr. Goodrich as follows:

'I agree with you that the land contracts for deed are not personal property, but that Mrs. Fensky is the sole heir at law, and now the sole owner in fee of all the Kansas real estate, including that contracted to be sold, but subject, of course, to debts, if any, of deceased, and the rights of contracting purchasers, and thus we will treat the matter. * * *

'So far as the real estate here is concerned, she became absolute owner of it in fee upon her husband's death; and without reference to any probate proceedings, whether an administrator was appointed or not, she can do as she pleases with it, subject all the time and only to the claims of creditors, and we all know there are no creditors. * * *

'I think your idea of having Mrs. Fensky buy out the other heirs is a good one. It will simplify matters and shorten up the proceeding."

179 Pac. 345-6.

The supreme court of Kansas, in Pickens v. Campbell, after setting forth the above correspondence, says:

"It thus appears that both lawyers, each acting independently of the other and on his own judgment, arrived at the same conclusions respecting the status of the real estate contracts. *There is not the slightest doubt that each one expressed his honest opinion. Both men were right, and, in settling with the heirs, representations as to the nature and value of the distributable estate were neither false nor fraudulent because the real estate contracts were not recognized as part of the personalty.*

Having determined that the contracts were not personal property, and that the land affected belonged to the widow, Mr. Campbell exercised great prudence in preventing information respecting them from being noised about. To be blunt about it, he sedulously concealed their existence, as far as he could, and for the soundest business reasons. *The circumstances were such that it would have been financially disastrous to involve the contracts in litigation. Covetous relatives of the deceased with everything to gain and nothing to lose, and possibly having exaggerated notions of Mr. Fensky's wealth, would be likely to find lawyers who would institute speculative suits for them, just as occurred ten years later. As admin-*

istrator, Mr. Campbell occupied no relation of trust or confidence toward distributees of personalty, with respect to real estate owned by the widow. He rested under no duty to such distributees to produce the contracts or to give information or advice concerning them; and the remarks of the learned trial judge, in a written opinion filed in connection with the decision of the case in the district court, are pertinent here:

'The matter of the character of Fensky's interest in these properties in Shawnee county was open for the investigation of any of the heirs. It was in fact investigated by Fred Fensky of Leavenworth, and by his attorney, and after such investigation the attorney evidently came to the same conclusion Campbell did. * * *

'Would a court be warranted in holding that Campbell was guilty of fraud under such circumstances? Unfortunately, before the trial of this cause he died. He is not here to tell his side of the story. It appears that he was a lawyer in good standing at the bar for many years. Aside from any facts shown in evidence as to his uprightness, *this court must presume, under the well-known rules of law applying to fraud, that he was honest and that his dealings were in good faith.* It would be an unjust thing to blacken his character by a finding of fraud on his part because he believed that under the law this property belonged to Mrs. Fensky, and acted upon that belief. This court will not give support to so unjust a contention.' " (Italics ours.)

179 Pac. 346.

We wish also to call the court's particular attention to the following extract from the first case of Pickens v. Campbell (98 Kan. 518, 159 Pac. 21):

> "The petition contains nothing to suggest a different rule here, but, *if the evidence should show that the administrator believed that the notes therein referred to followed the rule of real estate and became the property of the widow, no statements made by him in good faith by reason of that belief, however incorrect from a legal point of view, would warrant a reopening of the administration.*"
>
> 159 Pac. 23.

In Dowdall v. Cannedy, 32 Ill. App. 207, it was held that an honest expression of opinion as to the law, made by an executor in negotiating the purchase for himself of the interest of one of the heirs, even though erroneous, did not constitute fraud, nor justify the setting aside of such purchase.

The lower court in the case at bar, after reviewing all of the evidence, upheld the *good faith and honesty of Mr. Campbell.* We quote the following extracts from the decision:

"So far as Campbell was called upon to and did deal in his purely fiduciary capacity, I am persuaded from a careful consideration of all of the evidence that he was at all times actuated by honest and bona fide motives. He believed genuinely, as the Supreme Court of Kansas in the case brought against him and his bondsmen has since said he had a right to believe, that the land contracts entered into by Fensky and

joined in by the wife, did not serve to operate as an equitable conversion of the titles to the respective properties, and did not serve in any way to convey the legal or equitable titles to the realty described therein." [Tr. p. 195.]

"In my judgment, Campbell, assuming that the law of Kansas did regard the precise contracts under consideration here as failing to divest the Fenskys of the title to the realty, was correct and he displayed commendable judgment in the attitude that he took. It is apparent that Campbell, all through the course of the proceedings and as is evidenced by his letters written, was anxious to avoid any controversy in court respecting the matter, for one reason and another; but that he was thoroughly imbued with the idea that if such a controversy should arise, the rights of Mrs. Fensky, as he had stated them, would be sustained. This is made especially apparent in the language contained in his letter of February 25, 1905, in evidence and which is fairly illustrative of his entire course of conduct. If there was no fraud on his part in this behalf, as I am constrained to hold, then no wrong has been done to any of the complainants in the premises.

The persons who sold their interests in the estate to Mrs. Fensky were in no wise imposed upon. They had plenty of opportunity to discover the exact nature of the holdings of those who were occupying the lands in the Fensky addition; no impediment was placed in their way in the matter of securing complete information with respect to the precise character of the transactions which had enabled such persons to take possession of the property. They must be held to have been

concluded by the assignments given by them to Mrs. Fensky and by the action of the Probate Court in Shawnee county based thereon." [Tr. pp. 197-8.]

The language referred to contained in Mr. Campbell's letter of February 25, 1905, referred to by the court in the foregoing extract, is as follows:

"The fact is that although the deeds were *signed* before Fensky's death, the title did not pass to the purchaser till the deed was *delivered.* The title did not pass to the grantee until *after* it descended to you by virtue of Ferdinand's death and of course as the title (the land) descended to you all the proceeds therefrom afterwards (& the notes mtges) were your individual property. So we want to treat the Addn property just as we do the Goff, the Pruessner & the Rost properties & just as tho' there were no contracts of sale in existence—simply treat all of it as real estate that Ferdinand died seized of & which went to you as his sole heir at law & of course which you can do as you please with." [Tr. p. 433.]

"If Frederick should ever raise the question in court I think we can beat him but we want to avoid any contest if possible. I have had in view all the time the avoidance of any lawsuits, but I think it will not prejudice a settlement any with Frederick for you to say something like what I have penciled in regard to the Ks Adm'r." [Tr. p. 433.] (Italics ours.)

A similar statement is found in Campbell's letter of November 12, 1903, as shown by the following statement:

"The only thing that I am at all afraid of there being any trouble over is the Addition contracts. I am

a little afraid that the heirs may *claim* them as *personal property*, although I have not had a hint of anything of the kind as yet from any source, *and I don't believe that the court would so hold if the question was raised, but I would feel safer if the Addition people would take the deeds that you and Fred made and which, of course, when recorded, would appear as if the title passed all right while Fred was still living, but they don't seem to care about doing so and of course I cannot urge it.*" [Tr. pp. 363-4.] (Italics ours.)

Again, on November 23, 1903, Mr. Campbell writes:

"I don't know that any of them will ever claim that the Addn-contracts are a part of the personal estate and subject to the California law, but it is too early yet to tell what they will claim. And if they do make such a claim, I think we can defeat them, *but I want, if possible, to save the trouble and expense* even of defeating them." [Tr. pp. 367-8.]

Again, on May 26, 1904, Mr. Campbell writes:

"I don't fear any contest unless some of the heirs get the *fool notion* in their heads that the lot and land contracts are *personal* property and subject to division." [Tr. pp. 383-4.]

In passing, we wish to call the court's attention to the fact that the case of Brown v. Thomas, 37 Kan. 282, 15 Pac. 211, arose in Shawnee county, in which Mr. Campbell resided, and undoubtedly stood out prominently in his mind, which accounts for his statement in his first letter to Mr. Goodrich that the widow "is now the sole owner of the lands * * * (without investigating the question) * * *."

The claim of appellants that Campbell's conclusion as to the effect of these contracts, was not rendered in good faith, but with the fraudulent and corrupt purpose of enabling the widow to buy out the interests of the collateral heirs for a sum smaller than what they would be entitled to upon distribution, is conclusively answered by the record, which shows that expressed, was: "It will simplify matters and shorten up the proceedings." [Tr. p. 339.] It was not until later that Mrs. Fensky determined to do so. [Tr. pp. 350-354.]

The claim of appellants that the failure of the petition filed by J. W. McClure for the appointment of Mr. Campbell as administrator to mention the collateral heirs, indicates a fraudulent purpose *on the part of Mr. Campbell,* is conclusively answered by the following reasons given by him for the failure to mention the brothers and sisters: "I thought it time enough to call attention to brothers and sisters when it was fully determined whether there was anything *here* to 'distribute' to the brothers and sisters." [Tr. p. 339.] "Time enough for *me* to have the names of the 'heirs at law' after it is determined whether the Stoker money must be distributed here, or whether I may send it to the California administrator to distribute." [Tr. p. 350.] The Stoker money was the only property in Kansas at the time of the death of Ferdinand Fensky to be administered upon. [Tr. pp. 293-4.] The notes and mortgages included in his inventory having been sent to Kansas for administra-

tion as a matter of convenience after the death of Ferdinand Fensky. [Tr. pp. 294, 338, 345-6, 352, 357.]

Appellants' claim that Campbell's acting as "agent" for the widow, Mrs. Fensky, is an indication of a fraudulent intent as against appellants, is conclusively answered by the fact that the correspondence clearly shows that the reason for such agency was in connection with the real estate which descended direct to the widow without any reference to any probate proceedings [Tr. p. 337], of which there was a great deal needing someone to collect rents, make repairs, collections, etc. That this is clearly the purpose of such agency is indicated by the following references to the record: [Tr. pp. 330, 333, 346, 348], which shows that such agency was created before the widow had determined to buy out the interests of the collateral heirs. [Tr. p. 350, 354.] In Mr. Campbell's letter of September 30, 1903, he states: "As agent for Mrs. Fensky can sell and rent her real estate and report to her in her individual capacity for proceeds." [Tr. p. 348.] "When I collect rents, or proceeds from sale of real estate I will give receipt in name of J. Fensky, owner, by her agent M. T. Campbell." [Tr. 346.] There certainly was no impropriety in Mr. Campbell acting as agent for Mrs. Fensky in connection with her Kansas real property, particularly in view of the fact that there were no debts, and no possibility that any of it would ever have to be sold for the payment of debts. The entire record shows that Mr. Campbell carefully and scrupulously [Tr. pp. 461-505] kept his accounts and

in all his actions clearly designated the capacity in which he was acting.

(4) *Appellants knew of the existence of the contracts for the sale of lots in Fensky's Addition, and hence there was no concealment of their existence.*

We will not here re-state the many facts and circumstances showing that appellants had actual knowledge of the existence of these contracts. The facts and circumstances showing such knowledge, with the references to the record, are fully set forth in the statement of facts and again in what is hereafter said upon the subject of the statute of limitations and laches. This was the conclusion reached by the supreme court of Kansas (Pickens v. Campbell, 179 Pac. 343 at p. 346), and also by Judge Bledsoe. [Tr. p. 198.] Knowing of the existence of these contracts, as must be held upon the evidence, appellants are charged with a knowledge of their legal effect. Assuming for the sake of argument only, that Campbell had wilfully misrepresented to appellants the legal effect of these contracts, such would be a misrepresentation of a matter of law which could not constitute fraud.

Coddington v. Pensacola & G. R. Company, 103 U. S. 409.

(5) *Appellants' claim that because of the failure of Campbell, through an honest mistake as to the law, to inventory and account for the sales contracts, they would be entitled to relief in a court of equity to administer such contracts as unadministered assets, is wholly without merit.*

Appellants assigned their interests to all of the estate of Ferdinand Fensky to the widow Jeanette

Fensky. The probate courts in Kansas and in California distributed such interests as appellants would otherwise have had, to Jeanette Fensky, based upon such assignments. Such contracts being within the state of California at the time of the death of Ferdinand Fensky, even if appellants' contention as to the law could possibly be sustained, it would be personal property subject to distribution by the probate court in California. The decree of distribution of the probate court in California of the estate of Ferdinand Fensky distributed the property therein specifically described and *"all other properties belonging to said estate whether described herein or not."* [Tr. p. 642.]

Unless the assignments of appellants' interests in and to all of their respective right, title and interest "in and to the real and personal property wherever located of Ferdinand Fensky, deceased" [Tr. p. 585] are set aside—which could only be upon the ground of fraud—*they* would not be entitled to any of his unadministered assets. They must therefore establish their claim of fraud to set aside such assignments. An honest mistake as to the law would not constitute fraud. Therefore, it follows conclusively that such honest mistake would not justify the setting aside of such assignments, which must be done in order to entitle appellants to any relief. For these reasons, the principle set forth in Griffith v. Godey, 113 U. S. 89, to the effect that "a settlement of administrator's account by the decree of a probate court, does not conclude as to property accidentally or fraudulently with-

held from the account," is not applicable or in point. Clearly, appellants having parted with their interests in the estate, including unadministered assets, they would not be entitled to invoke such principle.

B. The Other Charges of Concealment and Misrepresentation of Alleged Assets of the Estate of Ferdinand Fensky Are Without Foundation, and There Was No Fraud in Connection Therewith.

As will be noted from the statement of facts hereinbefore set forth, the succeeding items hereinafter discussed are all comparatively small and would not appreciably increase the value of the undivided one-sixteenth interest of appellants, nor materially affect the adequacy of the consideration received by each of them.

(1) *The Stein, Sims and Kimmerly notes were not a part of the estate of Ferdinand Fensky, having been given to Jeanette Fensky in her husband's lifetime; and there was no fraud on the part of Campbell in failing to inventory the same.*

The correspondence shows that *the Kimmerly note* was executed to Mrs. Fensky in May, 1904. On April 2, 1904, Campbell writes to Mrs. Fensky as follows:

"By the way, does George [Kimmerly] still owe you anything on old indebtedness? I told Laura once to settle with him on the theory that whatever he owed was due to you individually (and that I would pay no attention to it as administrator). But if he does owe

you anything, would like to turn it in on the grading expense" [Tr. pp. 377-8], to which inquiry Mrs. Fensky replied:

"He has never settled with me yet nor given me any account of what he owes me. But his daughter wrote me that he will pay me as soon as he can. As I have no writing whatever, Ishall have to trust to his honesty." [Tr. p. 378.]

On January 5, 1905, Mrs. Fensky wrote to Mr. Campbell as follows:

"About the Paramore place, the least I could take for that would be $2800. I do not see how Mr. Kimmerly could buy it, since he can't pay the $300 which he owes me" [Tr. p. 421], to which Mr. Campbell replied:

"You say you do not see how Kimmerly can buy the place, as he cannot pay the $300 he now owes, and I think you are correct in your surmise. * * * By the way, did you give him credit on his due bill for the $10 balance due on bond?" [Tr. pp. 424-5.]

There is absolutely nothing in the record indicating that this indebtedness of $300 was not the individual property of Mrs. Fensky, as the foregoing correspondence indicates.

The only thing in the entire record which appellants can point to supporting their claim that the Kimmerly note belonged to the estate and not to Mrs. Fensky individually, is the statement of Campbell above quoted that the money was due to Mrs. Fensky "individually" and that he would "pay no attention to it as administrator." [Tr. p. 377.]

In regard to *the Stein notes*, one for $2400 and the other for $300: These were both in the possession and control of Mrs. Fensky. Mr. Campbell, who has been the family attorney for years prior to the death of Ferdinand Fensky, and who had a more thorough knowledge of Mr. Fensky's financial affairs and business in Kansas than anyone else [Tr. pp. 302, 320, 329], sent an undated post-card to Mrs. Fensky upon which appears the following:

"Did not Fred give you the Stein notes before he died? If so, they do not belong to the estate and should not be inventoried as part of the estate. Any notes that he turned over to you, whether he indorsed them or not, are your separate individual property, and you must be sure and call Judge Goodrich's attention to all such cases so that he will not put them in as part of the estate. See?" [Tr. p. 351.]

The date of this post-card is fixed by the diary referring to having written Mrs. Fensky under date of September 29, 1903. [Tr. p. 454.] Certainly, it must be presumed that Mr. Campbell from his knowledge of the family affairs, felt pretty sure that the notes had been given to Mrs. Fensky by Mr. Fensky *before* he died, and she being the widow—not knowing more than most women know about such matters,—he cautioned her that notes so given to her were her individual property and should not be included in the estate. Appellants try to make a mountain out of the use of the word "See." Nothing more was meant by this than if he had said, "Do you understand?"

Certainly Mr. Campbell's statement is more consistent with an honest purpose than with a fraudulent one; and the rule is well settled that statements which are as consistent with an honest purpose as with a fraudulent one, are not to be regarded as fraudulent. See note 33 L. R. A. (N. S.) 840. Particularly should this be true where the parties are dead and helpless to answer the imputation against their honesty. Mr. Campbell was right in his view of the law, for it is well settled that a gift of a negotiable instrument may be made by a mere transfer of possession of the instrument without indorsement.

California Civil Code, Sec. 1052;
Edwards v. Wagner, 121 Cal. 376;
First National Bank v. Moore, 137 Fed. 505, 507 (C. C. A. 9th Cir.).

A promissory note payable to order but not indorsed may be the subject of a gift *causa mortis*, and such a gift carries with it the mortgage by which the note is secured.

Druke v. Heiken, 61 Cal. 346.

It is claimed that Mrs. Fensky's letter to Stein asking him to give her a new note in place of the old ones and to date it back, is evidence against Mr. Campbell of a fraudulent purpose. There is nothing to show that he knew that Mrs. Fensky was writing, or ever wrote, to Stein; but, on the other hand, Mr. Goodrich informed Mr. Campbell that these notes had been

turned over to her by her husband. [Tr. p. 354.] Mrs. Fensky's letter to Stein does not show any fraud on her part. Such action on her part is perfectly consistent with the fact that Fensky had transferred and given her these notes before he died, and she, knowing them to be her property. desired to have her right in them evidenced by a new note in her own name, and bearing date as of the time they were assigned to her. The reference in the letter to the effect that she would not have to enter a new note into court, was probably due to a misunderstanding of Mr. Campbell's statement in his post-card cautioning her to call her lawyer's attention to all cases where notes had been turned over to her, so that they would not be inventoried in court as a part of her late husband's estate. Her letter being consistent with an honest purpose, and no question being raised by anyone while she was alive, and had an opportunity to explain her statement, and there being no evidence that these notes were not given to her by Mr. Fensky, an honest rather than a fraudulent purpose should be inferred. (33 L. R. A. N. S. 840, and cases cited.) It certainly seems strange, in view of the fact that Mrs. Fensky turned over to Mr. Campbell the numerous notes and mortgages which were inventoried by him, that she only claimed the Stein and the Sims notes to have been given to her by her husband. If she had been prompted by a fraudulent motive, she undoubtedly would have retained and made a claim as to the large amounts.

In regard to the Sims note, Mr. Campbell wrote to Mrs. Fensky as follows:

"Remember I am treating the Sims note as yours. Any notes that F. turned over to you before he died, whether he endorsed them or not, you have a *right* to claim as your own property." [Tr. p. 286.]

The above was written on a torn calendar leaf of August, 1903, but it was written much later than August 3, 1903, and apparently was never sent to Mrs. Fensky, for it speaks of settling with Sims about repairs, and on the next day, January 8, 1904, Mr. Campbell wrote to Mrs. Fensky a letter saying that he settled with Sims for repairs 'yesterday.' [Tr. p. 374.] These repairs were on real property belonging to Mrs. Fensky individually which Campbell had on September 28, 1903, advised her to have made and to take credit on the note which he owed her. [Tr. pp. 348, 349, 417.] This note was sent to Mr. Campbell on September 16, 1903, by Mrs. Fensky to secure the renewal of a chattel mortgage. [Tr. pp. 335, 359.] Mrs. Fensky received $300 in payment of this note. [Tr. p. 420.] She had previously allowed him credit on his note for $106.90 on account of repairs upon her individual real property. [Tr. p. 374.]

Mr. Sims testified that he had borrowed money from Ferdinand Fensky prior to his death and had dealt with Matt Campbell acting as attorney for Ferdinand Fensky. [Tr. p. 320.] He does not state whether or not the money that he borrowed was repaid or not, and there is nothing in the record to show that the

Sims note was payable to Ferdinand Fensky or that it was to secure the payment of the money which Mr. Sims mentioned as having borrowed. Mr. Campbell, who had represented Mr. Fensky and the widow, at all times consistently treated this note as belonging to Mrs. Fensky individually. There being nothing in the record to contradict their positive statements and consistent actions that this note belonged to Mrs. Fensky individually, appellants' claim, based upon mere conjecture that this note belonged to the estate of Ferdinand Fensky, is not established by the evidence and is contrary to the evidence.

(2) *That portion of the balance in the Citizens State Bank of Topeka, Kansas, which after being divided by Mr. Campbell was sent to Mrs. Fensky, belonged to her individually and not to the estate of Ferdinand Fensky.*

The record does not show, as appellants state, on p. 113 of their Brief, that "when Ferdinand Fensky died $942.82 stood to his credit on the books of the Citizens State Bank of Topeka, Kansas." The record clearly shows that this was the balance on hand on October 5, 1903, about two months *after* the death of Ferdinand Fensky. On September 24, 1903, Mrs. Fensky, through her attorney, requested Mr. Campbell to "get what money there is paid in upon the contracts" and to send the same to her, as she was in need of money, Mr. Goodrich stating in his letter that *"as there is no question but that Mrs. F. is entitled to the money upon*

these contracts, I can see no reason why the money could not be paid to her." [Tr. pp. 355, 343.] The record shows that on October 5, 1903, the balance of $942.82 was divided by Mr. Campbell, and $913.50 was sent to the widow as her individual property, $27 being retained by him as administrator of the Fensky estate. Mr. Campbell in his letter of October 6, 1903, says:

"Of this amount I think $913.57 belongs to Mrs. Fensky and $27 to the Fensky estate, and therefore took drafts payable to her for $913.57, which find enclosed, one for $886.57, and one for $27." [Tr. p. 355, 454.]

The record shows that Mr. Campbell receipted to the bank for $913.57 *as Agt. of Jeanette Fensky,* and at the same time receipted for $27, "for the administrator of the estate of F. Fensky, deceased." [Tr. pp. 309-310.] The assistant cashier of the bank testified that "in 1903 Ferdinand Fensky had no account" in the Citizens State Bank. [Tr. p. 309.] From the fact that the bank accepted receipts for the money as provided by Mr. Campbell, it must be presumed that the officials of the bank were satisfied in view of the necessity for the bank to protect itself, and that Campbell was satisfied that the moneys receipted for by him as agent for Mrs. Fensky and sent to her, were actually paid in from the real estate or upon the land contracts belonging to the widow *subsequent* to the death of Ferdinand Fensky. Considering that there were 29 of such contracts, and much real estate not covered by contracts,

and that two months elapsed between the death of Ferdinand Fensky and the dates these moneys were withdrawn, the amount credited to Mrs. Fensky individually is not disproportionate. The only thing in the entire record that appellants can seize upon as indicating that the money sent to Mrs. Fensky belonged to the estate, is that Campbell in a letter refers to the aggregate amount of the balance in bank, including the money belonging to Mrs. Fensky individually and the money belonging to the estate of Fensky as being a balance "due Fensky." It is quite obvious that some of the money being due to *Mrs. Fensky* individually and some to the *estate of Ferdinand Fensky,* that the reference to the aggregate balance as money being "due Fensky," is not inaccurate. It was undoubtedly used for the sake of brevity. If Mr. Campbell had believed or thought that the money belonged to the "Estate of Ferdinand Fensky," he would have used those words. The only other bit of evidence relied upon by appellants is a statement of the assistant cashier that his recollection was that these checks were "in the estate of F. Fensky, M. T. Campbell, administrator." But this statement when considered with his previous statement that in 1903 Ferdinand Fensky had no account in the bank, indicates quite clearly that the moneys were paid in after the death of Ferdinand Fensky. The statement of the cashier upon his "recollection", however, is inconsistent with the written receipts given to the bank at the time of the withdrawal of the money by Campbell, *as agent of Jeanette Fensky.*

There is no evidence whatever that Mrs. Fensky received the money from this bank *as administrator.* So far as Mrs. Fensky, Mr. Campbell, and the bank were concerned, they being the only parties having any knowledge as to the source of the moneys, there was no question but that *Mrs. Fensky was lawfully entitled to her individual right to the money sent her.* There is no showing whatever that they were not right.

(3) *There was no fraudulent undervaluation or misrepresentation of the value of the California realty.*

On this head of appellants' case, there was no representation at all made to appellants as to the *actual value* of the California realty, but merely a statement that it was *appraised* at so much, which was literally the truth. [Tr. pp. 294-306, 526-9, 634-9.] The statement given by Campbell to Mr. Kraus to be shown to appellants [Tr. p. 267] stated the *"appraised"* valuation of real and personal property exactly as it was actually appraised by the three court appraisers in California, and strictly followed the information given to Mr. Campbell by Mr. Goodrich [Tr. pp. 370-372], which was the only information which it appears from the record Mr. Campbell had on the subject.

This statement was seen by Mrs. Pickens while in the hands of Mr. Kraus [Tr. p. 280], upon whom she depended in her negotiations. Mrs. Pickens stated that she was "little acquainted with M. T. Campbell in his lifetime," and that "What I knew about the estate I learned from Mr. Kraus." [Tr. p. 279.]

Mr. Kraus testified "that statement handed to me by Mr. Campbell purported to give an appraised valuation of all of the real and personal property of Ferdinand Fensky in California."

Obviously, unless Mr. Campbell, Judge Goodrich or Jeanette Fensky are connected in some way with procuring the alleged under-appraisal, the mere fact that there was actually an under-valuation by the three appraisers, is immaterial. There is absolutely no showing of any such connection. The three appraisers who appraised the California real property were appointed by the court, and they took an oath to honestly and fairly appraise said property. They were all dead before the trial. They made their appraisement and it was accepted by the court. No connection between any of them and either Mr. Campbell, Judge Goodrich or Jeanette Fensky was shown, so that any connection on the part of any of these persons with the appraisal of the California real property, must rest wholly upon conjecture, unaided even by a suspicious circumstance.

We do not concede that the appraisement made by the court appraisers were below the actual value of the California real property. The values as fixed by the appraisers are not lower than the assessed valuations shown on the tax receipts in evidence. [Tr. p. 643.] At most, the discrepancy between the appraisements and the values at that date were not of a very marked or material character. For instance, the witness Hansen, who testified that lots 9 and 10 of Peck's Subdivision of San Pedro "were worth" in October,

1903, $10,000, admitted on cross-examination that Judge Goodrich, early in 1903, had bought the lot adjoining these two lots for $1200. [Tr. p. 523.] These two lots were purchased by the deceased in May, 1902, for $2025. [Tr. p. 630.] Lots 19 and 20 in Block C of Peck's Subdivision were situated about "half a mile from the main part of town" in a new subdivision without any houses in it and on a street which had been plowed and curbed and right across the street from a cemetery. It also appears that there was a boom in San Pedro which began in July, 1903, continuing into 1904, lasting about a year.

Mr. Hansen said that these lots "were worth" $4000. [Tr. p. 523.] Mr. Fensky bought them at auction during the "boom" for $2362.50 [Tr. p. 631], but from the location of the property and in view of the fact that the boom was so short-lived, we are not certain but that the appraisal made by the three court appraisers more truly represented the *actual value* of the lots than the fancy figure of the real estate agent made years afterwards and what Mr. Fensky thought they were worth in the excitement of the auction in the boom days.

The 60 acres in Orange county which was appraised by the appraisers for $1400 [Tr. p. 528] was assessed for taxation purposes for only $1350. [Tr. p. 644.] The testimony of the witness Head, made 15 years later, that the property was then worth forty to fifty dollars an acre—or about double the appraised value—

is not to be depended on, for he admitted on cross-examination that the Pacific Electric Railway came into that district in 1905, causing values of property in that district to go up "like a skyrocket." [Tr. p. 606.]

No evidence was offered by appellants showing that the appraisement of the other parcels of the California real property were not accurate. This fact is significant in a way, as to the accuracy of the appraisers' entire report, as compared with the opinion of expert witnesses "employed" 15 years later to give their opinion as to market values fifteen years previously.

Lots 9 and 10 in Peck's Subdivision above referred to, which is the chief item which appellants claim was under-appraised, were set apart by judicial decree to the widow as a homestead in a statutory proceeding in rem upon statutory notice, under the provisions of sections 1464-1468, California Code of Civil Procedure. [Tr. pp. 632-634.] This was in the early part of November, 1903, long before the negotiations by Jeanette Fensky to purchase the interest of appellants in the estate of Ferdinand Fensky.

If there was any undervaluation as to such land, it was intrinsic fraud, for, under the statute, the widow was entitled to have land only to the value of $5000 set apart to her as a homestead, and in her petition she claimed honestly that the value of this property was less than $5000, and the court in entering this judgment setting apart said property as a homestead

to her, necessarily passed upon the truthfulness of her representation as to its value.

Fealey v. Fealey, 104 Cal. 354, at pp. 358-359;
Warren v. Ellis, 39 Cal. App. 542;
United States v. Throckmorton, 98 U. S. 61.

It appears clearly from the record that appellants had actual notice of this proceeding. [Tr. p. 27.] Nothing whatsoever was done to prevent them from contesting the allowance of the property to the widow as a homestead. Said judgment is conclusive and binding as to the value of the property, and also that the title to the land set apart to her was community property.

In Fealey v. Fealey, *supra*, it was claimed that the defendant made a false statement in her petition, and also on the witness stand, *as to the nature of the title to land set apart to her as a homestead.* The court, in disposing of this contention, said:

> "* * * but the question of title thus presented and sought to be litigated in this action was necessarily involved in the proceeding to set apart the homestead, and the order or judgment of the court therein was a determination that the allegation of defendant's petition in regard to the nature of the title to the land so set apart was true, and that her testimony relating to the same matter given upon the trial of that proceeding was also true. The plaintiff had notice of the pendency of that proceeding, and no fraud was practiced upon her by which she was prevented from appearing

> therein and contesting the allegation of defendant's petition, or showing that the testimony given by her was unworthy of credit. Under these circumstances that judgment is conclusive upon the plaintiff, and she cannot be permitted to bring into litigation the same matters therein involved and settled by that judgment. The case made by the complaint here falls exactly within the rule declared in United States v. Throckmorton, 98 U. S. 61; Griffith's Estate, 84 Cal. 113; and Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159."

Under the provisions of section 1468, California Code of Civil Procedure, the property that was set apart to the widow as a probate homestead became hers absolutely, there being no minor children. Therefore, any undervaluation in the appraisement or any alleged representation thereafter made by appellants as to its value, is not material.

The claim that Jeanette Fensky, as administratrix, failed to inventory an alleged contract of sale for a part of the Orange county property is likewise without merit. The inventory filed shows that the real property covered by this alleged contract was included in the inventory as real estate. [Tr. p. 528.] In view of the fact that *the law of descent in California* (Sec. 1386 Cal. Civil Code) *is the same for real and personal property*, no one was injured in so doing. It does not appear, however, what the terms of the alleged contract were, same having been lost [Tr. p. 605], or whether or not it was such a contract as could be specifically enforced under sections 3274, 3390, Civil Code.

Furthermore, this is not one of the grounds of recovery alleged in the bill of complaint; no issues were raised as to this subject; and the claim is a straw grabbed at as a pure afterthought.

(4) *The balance in the joint bank account and the certificate of deposit in their joint names, if not the property of Jeanette Fensky before the death of her husband, became her property by right of survivorship upon the death of her husband.*

The record shows that the money on deposit with the First Trust and Savings Bank at Pasadena was deposited to the joint credit of Ferdinand Fensky and Jeanette Fensky. There is only one signature card, viz., that of Jeanette Fensky, and from this fact the officer of the bank testifying as to this account stated that it indicated that Mrs. Fensky had made the initial deposit. [Tr. pp. 251-252.] Presumably, therefore, the money deposited by her therein August 1, 1903, was her own individual money. In any event, as a matter of law, the deposit was with the right of survivorship. It is not essential that the right of survivorship be expressly declared.

Crowley v. Savings Union Bank, 30 Cal. App. 144;

Kennedy v. McMurray, 169 Cal. 287.

In Crowley v. Savings Union Bank, *supra*, the rule was thus stated:

"The right of plaintiff to the balance for which she brought the action arises from the *well-under-*

stood incident of a joint tenancy—that, upon the death of one of two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship, and in virtue of the original event creating the tenancy. The principles governing this case are so well settled that discussion of them would be supererogatory."

30 Cal. App. 150.

In Kennedy v. McMurray, *supra*, the court said:

"It was undoubtedly intended to and did create a joint interest or ownership in the deposit and this being the intention and *as the right of survivorship applies to joint interests or ownership of personal property it must have been the intention of the deceased Kennedy in declaring the deposit to be joint property to have intended that the incident which follows joint ownership should apply to it and that upon his death his daughter should take the deposit as survivor. * * * It was unnecessary to accompany the creation of the joint ownership with a declaration respecting survivorship. That followed as a legal incident to the creation of the joint interest, a matter which Kennedy must be held to have known and intended to effect by the clear creation of the joint interest between himself and appellant in the deposit.*"

169 Cal. 293-4.

See, also:

McDougald v. Boyd, 172 Cal. 753;

Estate of Gurnsey, 177 Cal. 211.

In the case last cited the moneys on deposit were the property of the husband before his death and his

daughter was held to be entitled to the same by right of survivorship. In the case at bar, the moneys being deposited by Jeanette Fensky, as before stated, were presumably her own.

At the time of the death of Ferdinand Fensky Mrs. Fensky held a certificate of deposit of the Pasadena National Bank for $800.00 in the name of "F. or Jeanette Fensky," and payable "to the order of either on the return of this certificate properly endorsed." This certificate of deposit is dated July 17, 1903, and undoubtedly, by reason of the joint tenancy created, became the property of Mrs. Fensky absolutely by right of survivorship, upon the death of her husband, under the decisions above cited.

(5) *The claim that Mr. Campbell misrepresented to appellants the collectibility of the notes and mortgages inventoried in Kansas, is wholly without merit.*

His statement in the letter to Mrs. Schutt is as follows:

"A number of the debtors want time in which to pay, and if Mrs. Fensky, the widow, was to take over these notes, she could accommodate these people and still collect all the money on the notes in exchange for them. If collection is forced, there will necessarily be much expense and loss pending collection." [Tr. pp. 393-4.] Mr. Kraus, whom appellants consulted and upon whom they relied, when shown the list of notes and mortgages, said:

"Some of the men whose names appear here were not very good pay, and especially after 1903. That

flood depreciated property along the low lands in and around Topeka, and it is so today. I sold my old home over there we figured being worth $2500 for $850. I would not have wanted to discount Mr. Foucht's note for $800 at that time. * * * I would not have bought the notes for fifty cents on the dollar at the time of the flood in 1903." [Tr. p. 274.]

As late as December 15, 1904,—which was three or four months *after* Jeanette Fensky acquired the interests of appellants in the estate of Ferdinand Fensky,—Mr. Campbell wrote Mrs. Fensky:

"I do not care to press them very hard as long as there is a reasonable show for you to become the sole owner of the notes and mortgages." [Tr. p. 419.]

Mr. Campbell stated about six months after appellants had sold out their interests, that he had directed the debtors who were writing him to reduce interest, give more time, to throw off part of the debt, to write to Mrs. Fensky. [Tr. p. 428.]

It does not appear that Mr. Campbell ever represented that the notes and mortgages could not eventually be collected. His statements were that the risk of collection would fall upon the widow, if she purchased the interest of the other heirs, and if collections were forced for the purpose of distributing the estate in cash, that some loss would result thereby. The fact that most of the notes were *eventually* collected, shows the wisdom of Mr. Campbell's advice. The profit which Mrs. Fensky derived by reason of purchasing the interests of the heirs, is to be attributed to not forcing the collection and to giving the debtors more time.

necessitated by the floods of 1903 and 1904. Certainly this was the humane thing to do. If such an arrangement had not been made, it is quite probable as Mr. Campbell stated, if distribution was to be made in cash, that it would have involved some delay and loss. Mr. Campbell told Mr. Krauss *before* Mrs. Fensky purchased the interests of appellants, that if he would secure a power of attorney from the sister in Germany, that he would make distribution at once [Tr.p. 383], although under the Kansas laws, in view of the fact that creditors have three years within which to file claims, distribution could not be forced without putting up a bond.

(6) *Appellants received a fair and reasonable compensation for their interest in the estate of Ferdinand Fensky from Mrs. Fensky and were in no way imposed upon.*

After the payment of all debts and expenses of administration, including family allowance and the homestead awarded by the court to Mrs. Fensky in California, and including the fees of Mr. Campbell as administrator, a balance of $21,209.00 was left for distribution, of which amount, if there had been no assignments by the collateral heirs, the widow would have been entitled to one-half, to-wit: $10,604.50, and each of the collateral heirs to a *one-sixteenth*. Considering that at the time the assignments were made by appellants to Mrs. Fensky (July, 1904) very few of the notes and mortgages had been collected [Tr. pp. 461-3] and that it was doubtful how much of them would be

collected in view of the fact that creditors had three years after the death of Ferdinand Fensky in which to present the claims,—the payment of $1000.00 to each of them, except Fred Fensky, the last one to settle, who was paid $1100.00, was entirely fair and reasonable. Appellants were getting their money *at once* and the widow took the risk of collecting the notes and mortgages and the risk of creditors' claims being filed within the next two years thereafter. The fact that nearly all of these notes and mortgages, when the debtors who suffered severe losses from the flood in 1903 were humanely given more time, *eventually* paid nearly all these notes and mortgages, is immaterial. Mr. Campbell stated to appellants that this would be the case. [Tr. pp. 274, 393.] Mr. Krauss, the husband of one of the heirs who had lived in Topeka many years, knew that many of the makers of these notes and mortgages due the estate on the list shown him "were not very good pay" and "especially after" the flood of 1903, and stated that he would not have bought the notes "for fifty cents on the dollar at the time of the flood in 1903. The land contracts were mentioned to him and he was informed that they constituted real estate and went direct to the widow. [Tr. p. 269.] He also consulted an attorney. [Tr. p. 356.] After the proposition of settlement was submitted to him, he accepted the proposition of Mrs. Fensky, and neither he nor his wife are making any complaint. [Tr. p. 277.]

Mrs. Wendt, the sister living in Germany, also employed an attorney by the name of Slater [Tr. p. 423]

who came to the conclusion that the offer of the widow "was a square thing." [Tr. p. 424.] She is making no complaint.

Fred Fensky, who lived in Leavenworth, Kansas, one of the heirs, came to Topeka and remained a couple of days, and who knew of the land contracts, looked over the property in Fensky's addition, and made a thorough investigation. He also employed an attorney to advise him relating to the land contracts [Tr. pp. 275, 277], and after consulting his attorney, Mr. Jackson, as to whether or not the land contracts were personalty in which he was entitled to participate, was satisfied that he had no interest in the land contracts and was satisfied to accept $1100.00 for his interest. [Tr. p. 275.] He was the only heir who had not sold out and in order to close the matter he was paid $100.00 more than the other heirs, which seemed to be perfectly satisfactory to him, and he is making no complaint now. Neither are any of the other heirs making any complaint, nor did the father of the intervenor during his lifetime make any complaint. Mrs. Krauss, the only one of them who testified in this case, said: "I never, myself, made any claim that I was not treated right." [Tr. p. 277.]

The consideration for the assignment and quitclaims from appellants to Jeanette Fensky of their interest in the estate of Ferdinand Fensky, was furnished by Jeanette Fensky.

She, as the widow of deceased, was admittedly entitled to all of the Kansas realty and one-half of all

the personalty. The moneys used in procuring the assignments and quit-claim deeds were advanced by Campbell to Mrs. Fensky, at her request [Tr.pp. 289, 409, 411] on account of her recognized and indisputable share of the estate of Ferdinand Fensky. [Tr. pp. 407, 408.] Campbell in each instance secured the receipt of Mrs. Fensky for the moneys so advanced. [Tr. pp. 408, 411, 413, 415, 427, 439, 457.]

In view of the fact that Ferdinand Fensky left no debts in Kansas [Tr. p. 302] and that Mrs. Fensky's interests would far exceed the amount advanced by Campbell to her and of her financial responsibility and promise to return the amount advanced if ever required, he was willing to assume the personal risk of advancing this money to Mrs. Fensky. [Tr. p. 407.] It therefore follows conclusively that such money did not belong, and was not regarded as money belonging, to the estate of Ferdinand Fensky, but was money, and was regarded as money, then belonging and properly so to Mrs. Fensky.

Furthermore, in view of the fact that Mrs. Fensky bought out the interest of all the heirs, it makes no difference to appellants from where she got the money, if she paid them. The circumstance that the written request to Mr. Campbell, as administrator, to advance this money is undated, is explained in Mr. Campbell's letter to Mrs. Fensky. [Tr. p. 411.]

In this connection, Judge Bledsoe, in his opinion to the court below, said:

> "That they were paid for their assignments out of money in the hands of the administrator is of

no moment. They conveyed and intended to convey all their interest in the estate for the consideration received. Whether the identical money passed came from Mrs. Fensky personally or from the administrator's bank account is immaterial. In view of their voluntary assignments, they received all that they were entitled to." [Tr. p. 198.]

The Supreme Court of Kansas took the same view. (Pickens v. Campbell, 179 Pac. 343.)

NOTE: We wish to note, in passing, that the statement in appellants' brief (p. 110) that Campbell retained for his services the $3000 advanced to the widow (in addition to the $8016.10 advanced to the widow as aforesaid) is conclusively refuted by the record. [Tr. pp. 428, 439, 481.]

THE JUDGMENT IN PICKENS V. CAMPBELL, RENDERED BY THE KANSAS COURT, IS RES JUDICATA OF THE ISSUES THERE DETERMINED, AND HEREIN AGAIN ATTEMPTED TO BE LITIGATED, AND IS BINDING ON APPELLANTS IN THIS CASE.

The pleadings and the entire proceedings of the court in the case of *Pickens v. Campbell,* 179 Pac. 343, were introduced in evidence and appear at pages 670 to 731 of the transcript. An examination of this record will show that *all of the issues of fraud on the part of Mr. Campbell and of the nature and effect of the Kansas realty contracts, which are again raised in this case were also raised in that case, and were decided adversely to appellants herein.* It conclusively

adjudicated (1) that the Kansas land covered by the land contracts were not personalty but realty descending directly to Mrs. Fensky, the widow, to be inventoried as real property, (2) that no property which should have been inventoried by Campbell was omitted from his inventory fraudulently, or otherwise; and (3) that Campbell was guilty of no fraud or wrongdoing of any kind upon appellants.

The general rule is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies, and this even if the second suit is for a different cause of action; for the right, question or fact once so determined must, as between the same parties *or their privies,* be taken as conclusively established, so long as the judgment of the first suit remains unmodified.

Southern Pacific R. R. Co. v. United States, 168 U. S. 1, at pp. 46 to 60;
Deposit Bank v. Frankfort, 191 U. S. 499, 512;
Fayerweather v. Ritch, 195 U. S. 276, 299;
Baker v. Eilers Music Co., 175 Cal. 657, 659;
Lake v. Bonynge, 161 Cal. 120, 127-131;
Curtis v. Upton, 175 Cal. 322, 331;
Koehler v. Holt Mfg. Co., 146 Cal. 335, 337;
Green v. Thornton, 130 Cal. 482, 485;
Garwood v. Garwood, 29 Cal. 515, 521;
Jackson v. Lodge, 36 Cal. 28, 37.

"Privity means a mutual or successive relationship to the same rights of property, and within the rules relating to the conclusiveness of judgments, all persons are privies to a judgment whose succession to the rights of property thereby adjudicated or affected were derived through or under one or other of the parties to the action, and accrued subsequent to the commencement of that suit."

23 Cyc. 1253.

The title to the *personal property* owned by Ferdinand Fensky and administered on in Kansas, was vested in Mr. Campbell, as administrator, and Jeanette Fensky, the distributee of such personalty, took title from Campbell, and not from her deceased husband. The rule in regard to *real property* is different, such property going direct to the heirs, and not to or through the administrator.

In 2 Van Fleet on Prior Adjudication, Sec. 465, it is said:

"So far as the personal estate of a decedent is concerned, it does not technically descend to the heirs but passes to an administrator or executor through whom they take as distributees. Hence, in regard to that part of the estate, the privity between them and him is complete."

And in section 466 the author says:

"The real estate of a decedent descends directly to the heirs, and the interest of the administrator

> is in the nature of a naked conditional power, namely: He has the right to sell, if necessary, to pay debts. Hence, the privity between him and the heirs in respect to it is slight or none at all."

Certainly, therefore, as the successor in interest, *as to personalty,* of the administrator Campbell, who was the defendant in the action brought by appellants in Pickens v. Campbell (179 Pac. 343), Jeanette Fensky must be considered as being in privity with Campbell the defendant in that action, and would be therefore entitled to the benefit of that adjudication.

> 2 Van Fleet on Prior Adjudications, section 465;
>
> Pond v. Pond's Estate (Vt.), 65 Atl. 97;
>
> Moody v. Peyton, 135 Mo. 482, 58 Am. St. Rep. 604, 606;
>
> Darrow v. Clakins, 39 N. Y. Supp. 527;

Her successors in interest, who are appellees herein, are therefore also in privity with Campbell.

In Darrow v. Calkins, 39 N. Y. Supp. 527, the representative of a deceased partner sought a settlement of the affairs of the partnership. It was held that in such a proceeding the court may determine whether or not there is any partnership realty which could descend to the heirs, and that its decision thereon is conclusive on the heirs though they were not parties to the proceeding. The court regarded the partnership realty as subject to the attributes of personal

property until the final settlement of the partnership affairs, and said:

> "Until, therefore, there was this final settlement and adjustment of the accounts, the heirs of Darrow were not vested with the legal title to this real estate. What they were entitled to was an accounting of the partnership affairs, and this is what they had through the representative of Darrow's estate, who was competent to maintain an action for that purpose. Upon this accounting the court had jurisdiction to adjust the affairs of the partnership, and to determine the question whether or not there existed any real property which would descend to the heir. It did not follow, because there was, in fact, real property which equitably belonged to the partnership, that upon an adjustment of the equities between the members of the fim it would necessarily so remain, and be set apart as property which would descend to the heir. But it was competent, on such accounting, for the court to determine, in adjusting the equities between the parties, that, when adjusted, there remained no real property for distribution or descent, but that, upon adjustment, there remained a certain sum of money due to his estate. This, in effect, is what the court determined, and such is the effect of the decree. Having power to adjudicate upon the subject-matter in an action where the estate of Darrow was represented as a party, and possessing power to determine that there existed no real property of the partnership to which the estate of Darrow was entitled, and having so determined, we see no reason why such adjudication is not conclusive of

> that question and constitutes a bar binding upon his estate and his heirs."

The views above expressed in Van Fleet on Prior Adjudication are referred to with approval in Pond v. Estate of Pond, 65 Atl. 97 (Vt.), and in Moody v. Peyton, 135 Mo. 482, 58 Am. St. Rep. 604, 606.

In Southern Pacific R. R. Co. v. United States, 168 U. S. 1, it is held, to quote the syllabus, that

> "A decision as to the sufficiency of maps to make a definite location or designation of the route of a railroad, on which the title to lands included in a railroad grant depends, is conclusive in another action then pending between the same parties respecting other lands within the same grant."

and that

> "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies even if that suit is for a different cause of action." (See pp. 48 *et seq.*)

Complainants are caught on the horns of a dilemma: In order to avoid the rule above set forth that *as regards personalty* the heirs are considered as in privity with the administrator, complainants here are required to take the position that the Kansas realty covered by the contracts in question remained *realty* unaffected by the sales contracts, and under the laws of Kansas properly descended to the widow as realty, in which

case complainants' case fails; if, on the other hand, as complainants claim, an equitable conversion of said realty into *personal property* was worked by said contracts, then, as shown by the foregoing cases, the widow, Jeanette Fensky, and the defendants as the successors in interest of Jeanette Fensky, are in privity as to it with the administrator Campbell, and complainants are therefore barred by the judgment of the Kansas court in Pickens v. Campbell.

Neither of the two solitary authorities cited by appellants in their brief (page 147) in support of their claim that there is no privity between the defendant Campbell in the case of Pickens v. Campbell and appellees, are in point. The extract from the note in 8 L. R. A., N. S., was used in connection with a situation entirely different from that involved in the case at bar, as clearly appears from the note which is entitled:

> "Is an administrator or the Executor in such privity with a legatee, distributee or creditor *that he may assert a personal defense of the latter to a claim against the Estate*" (in an action against him as such administrator).

In Sholty v. McIntyre (135 Ill. 171, 29 N. E. 43), cited by appellants, a judgment was recovered against an administrator for a trespass by his intestate. A brother, who was an heir of the intestate (without the knowledge or consent of the administrator) took an appeal. The court very properly held that an appeal could only be taken by the administrator, and that

the appeal taken by the brother of the deceased was rightly dismissed upon the motion of the administrator. This was not a case involving the right of the successors in interest of the administrator to rely upon a prior adjudication in a case to which the administrator was a party.

Not only does this case come within the general rule that, in order to make a former judgment a bar to a subsequent action, it must have been rendered in an action between the same parties or between those *in privity* with them. But there is a well settled exception to this general statement of the rule:

WHERE AN AGENT IN A TRANSACTION IS SUED AFTER THE TERMINATION OF HIS AGENCY, AND UPON A TRIAL OF THE MERITS THE ISSUE IS DETERMINED AGAINST THE PLAINTIFF, THE PRINCIPAL THOUGH NOT A PARTY TO THE SUIT, CAN AVAIL HIMSELF OF THE JUDGMENT AS A BAR WHEN HE IS SUED BY THE SAME PLAINTIFF FOR THE SAME ALLEGED MISCONDUCT OR FRAUD OF THE AGENT.

We cite the following authorities:

Portland Gold Mining Co. v. Stratton's Independence Limited, 158 Fed. 63 (C. C. A.);

Emma Silver Mining Co. v. Emma Silver Mining Co., 7 Fed. 401, 407;

New Orleans & Northeastern R. R. Co. v. Jopes, 142 U. S. 18, 24;

Featherston v. Newburgh & C. Turnpike Road, 71 Hun. 109, 24 N. Y. Supp. 603;

Ransom v. City of Pierre, 101 Fed. 665, 41 C. C. A. 585;

Note at 54 L. R. A., pp. 649-656, and case there cited.

In the case at bar *Campbell was the immediate actor in securing the assignments and quitclaim deeds from appellants. He made whatever representations were made. If in so doing he committed no fraud, certainly his principal, Jeanette Fensky, could have committed no fraud by reason of his acts,* from which it conclusively follows that the appellees herein, as the successors in interest of Jeanette Fensky, cannot be charged with any such fraud.

The author of the note in 54 L. R. A., *supra*, summarizes the cases cited by him as follows:

> "While servants and agents are not usually regarded as falling within the legal definition of privies, a previous determination in favor of a servant or agent is deemed conclusive upon a subsequent action against the master or principal as having been between the same parties, the term 'parties' to an action within the meaning of the law of *res adjudicata* including not only the persons named, but also persons whose rights have been legally represented by them. Some of the Missouri cases, however, seem to have adopted a somewhat more strict construction of the term 'parties.'
>
> With reference to identity of the issues the matter in issue is that upon which the plaintiff

proceeds by his action, and which the defendant controverts by his pleadings, and not the facts offered in evidence to establish the issue, though controverted. *And the question whether or not the issues in the two suits are the same depends upon whether both might be determined upon the same testimony presented by the same parties or those by whom they were legally represented.* A mere difference in the method of statement, or in the subject-matter, or the mere fact that other issues were involved, is of no effect."

In Portland Gold Mining Co. v. Stratton's Independence, *supra*, the court quotes the following extract from the second case above cited:

"Well in point is Emma Silver Mining Co., Limited, v. Emma Silver Mining Co. of New York (C. C.), 7 Fed. 401, 407, which was a suit in equity for the rescission of the sale of a mine and other property because of deceit charged to have been practiced by the defendant, through certain of its agents, in effecting the sale. The defendant interposed a plea to the effect that the complainant had theretofore instituted an action at law against the defendant's agents to recover damages for the deceit, in which the matter of that charge had been adjudicated in their favor; and, in response to the complainant's contention that the defendant could not avail itself of that judgment as a bar, or as a conclusive determination of the facts, because the defendant was not a party to it, it was said by Judge Choate:

'The weight of authority, however, is that, where an agent in a transaction is sued after the

termination of his agency, and, upon a trial of the merits, the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against his former agent, or made responsible by the agent's bad pleading or blunders in the trial of the cause, because so to conclude him would be to deprive him of his property without due process of law, *yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both.'* "

A leading case in the United States on this subject is Emery v. Fowler, 39 Me. 326, which was an action in trespass *quare clausum* against one who had acted under the direction of his father in a prior action by the plaintiff against the father for the same act. The father, who admitted that the son acted under his direction, had been acquitted, and it was held that the son was entitled to the benefit of that adjudication. We quote from the opinion:

"To permit a person to commence an action against the principal, and to prove the acts al-

> leged to be trespasses, to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. *In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it, when the same question has been decided and judgment rendered between parties responsible for the acts of others.*"

In the case at bar the situation is just the reverse, but the principle is the same. The agent, Campbell, was adjudged to have committed no fraud. His principal, Mrs. Fensky, for whom he was acting *as agent* in securing the assignments in question, and appellees, as her successors in interest, are entitled to the benefit of that adjudication.

From the foregoing citation of authorities it is manifest that the case of Pickens v. Campbell, 179 Pac. 343, is a conclusive determination of the same facts and issues which complainants are here again attempting to litigate, namely, that the Kansas contracts did not work an equitable conversion, and that no fraud was committed upon complainants in securing the assignments and quitclaim deeds of their interest as heirs of Ferdinand Fensky.

Even If Appellants Had Proved Sufficient Fraud to Set Aside the Quitclaims and Releases to the Widow Jeanette Fensky, and the Decree of Distribution in the Estate of Ferdinand Fensky, it Would Have Been of No Avail to Them, for the Interest of Not One of the Appellants in the Estate of Ferdinand Fensky Can Be Definitely or at All Traced to Any Specific Property in the Hands of Appellees.

Of course, no fraud, either actual or constructive, has been proven by appellants, as is hereinbefore pointed out; but, even if such fraud had been proven, it would not avail appellants, for the reason that none of them can trace the *alleged balance* of his or her particular undivided one-sixteenth interest in the estate of Ferdinand Fensky, which was never segregated, to any specific property in the hands of defendants, with any definiteness or certainty, or at all.

The right of a *cestui que* trust to reclaim trust funds, or property into which it is alleged the same has been converted—particularly as here when the property is in the hands of third parties—is founded on the *right of property*, and not on the ground of compensation for its loss. Accordingly, the specific money of the alleged *cestui que trust* must be clearly traced, and identified in specie in the property claimed. When the claimant is unable to do this, the trust fails, and *his claim becomes one only for compensation for the loss of the property against the alleged trustee, or the trustee's estate.*

Fowler v. True, 76 Mo. 43.

So in the case at bar: Since no one of the complainants can trace her alleged particular moneys into any particular property, they at most had but a *claim against the estate of Jeanette Fensky* for compensation for the alleged loss. This claim should have been presented to the administrator of her estate within the time limited by law for the presentation of claims of creditors against the estate of Jeanette Fensky.

The rule is well stated in Ferris v. Van Vechten, 73 N. Y. 121, as follows:

> "The money paid by the trustee for lands or other property, or for choses in action sought to be subjected to the original trust, must be identified as trust moneys; and this is clearly recognized in all the cases, and in very many of them this has been the difficult question of fact upon which they have hinged, and the principle to be deduced from them is, that when the trust fund has consisted of money, and been mingled with other moneys of the trustee in one mass, undivided and indistinguishable, and the trustee has made investments generally from moneys in his possession, the *cestui que* trust cannot claim a specific lien upon the property or funds constituting the investments. (Hill on Trustees, m. p. 522.) * * * It is the difficulty of tracing the trust money, which has no ear-mark, that prevents the application of the rule. (See, also, Hutchinson v. Reed, Hoff. Ch. R. 316, and cases by Asst. V. Ch., 2 Kent's Com., 623, 624; Trecothick v. Austin, 4 Mason 29.)
>
> There can be no presumption as against the defendants whose property is sought to be affected

by the trust, which attached to the moneys realized by Van Vechten from the sale of lands under the power. So far as appears they are innocent of all wrong-doing, and have not colluded or combined with the executors to violate the trust, and it is not found that they assented to or had any knowledge of any misappropriation of the fund, and if made trustees in virtue of their ownership of the lands they are made so, not by reason of any act of theirs, but as the legal result of the fact that trust moneys have been misapplied by a trustee of the fund to relieve of a burden their lands, held in trust for another purpose by the same trustee."

73 N. Y. 121-122.

The weight of authority is to the effect that in order that a trust fund or trust property which has been misapplied or wrongfully dissipated may be followed in equity into lands claimed to have been purchased therewith, or the proceeds thereof, and the trust enforced against the persons who have acquired the lands by gift or with notice, it is essential that it be *clearly traced and identified in the particular land claimed.*

Byrne v. McGrath, 130 Cal. 316;

Spokane Co. v. Spokane First Nat. Bank, 68 Fed. 979, 16 C. C. A. 81;

Lowe v. Jones, 192 Mass. 94, 78 N. E. 402, 116 Am. St. Rep. 225, 6 L. R. A. (N. S.) 487;

Mercantile Trust Co. v. St. Louis & S. F. Ry. Co., 99 Fed. 485;

Commercial Bank v. Armstrong, 148 U. S. 50;
Multnomah Co. v. Oregon Nat. Bank, 61 Fed. 912;
Illinois Trust etc. Bank v. First Nat. Bank of Buffalo, 15 Fed. 858.

In Lowe v. Jones, *supra*, it was held that a trust cannot be established against the proceeds of trust property wrongfully disposed of by the trustee, which are in the hands of the administrator or his insolvent estate, unless such proceeds can be identified and traced into some specific fund or property. We quote the following extract from Crawford Co. Commrs. v. Strawn (C. C. A., 6th Cir.), 15 L. R. A. (N. S.) 1106:

> "But, aside from this view of the evidence, the claim to a general charge upon any and all property acquired by the bank, through the use of the general funds of the bank with which this trust fund had been blended, is not supported by the weight of authority; nor do the cases decided by this court go so far. That the misuse of this trust fund has gone to swell, in one form or another, the general assets of the bank, is not enough to charge the whole with a lien, will not be seriously contested. The cases which deny such a contention are numerous. To impress a trust upon the property of a tort feasor who has used the trust fund in his private affairs, it must be traced in its original shape or substituted form. City Bank v. Blackmore, 21 C. C. A. 514, 43 U. S. App. 617, 75 Fed. 771; *Re* Taft, 66 C. C. A. 385, 133 Fed. 511, 514; Erie R. Co. v. Dial, 72 C. C. A. 183, 140 Fed. 689, 691; Smith v.

Mottley, 9 L. R. A. (N. S.) 876, 80 C. C. A. 154, 150 Fed. 266; and Smith v. Au Gres Twp., 80 C. C. A. 145, 150 Fed. 257,—are cases decided by this court, which recognize that the mere misapplication of a trust fund does not create a general lien upon the tort feasor's estate. In other courts the question has been presented more squarely for a decision, and supports the rule that an identification of the fund itself, or a tracing into some specific property, is essential to reach the property of a wrong-doer, either in the hands of an assignee, trustee, receiver, or under a lien fastened by a creditor. Peters v. Bain, 133 U. S. 670, 693, 33 L. ed. 696, 704, 10 Sup. Ct. Rep. 354; [citing other cases]; Spokane County v. Clark (C. C.), 61 Fed. 538, *affirmed by the circuit court of appeals for the ninth circuit,* 16 C. C. A. 81, 29 U. S. App. 707, 68 Fed. 979, 991, 992; * * *.

Peters v. Bain, 133 U. S. 671, 678, 693, 33 L. Ed. 696, 699, 704, 10 Sup. Ct. Rep. 354, is a very close authority upon the facts of this case. There the moneys of a national bank had been obtained and used in breach of trust by a firm of private bankers. Both failed,—the firm after a general assignment. The receiver of the national bank sought to impress with a trust the entire property of the firm in the hands of its assignee. It was shown that the bank's money had been used exclusively in the purchase of certain property. It was sought, also, to impress a lien upon other property which had been 'paid for by the firm out of the general mass of moneys in their possession, and which may or may not have been made up in part of what had been wrongfully

taken from the bank.' Waite, Ch. J., heard the case on circuit, and, as to this class of property, said: 'There the purchases were made with moneys that cannot be identified as belonging to the bank. The payments were all, so far as now appears, from the general fund then in the possession and under the control of the firm. Some of the money of the bank may have gone into this fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could, in any event, claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put there. *Purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose.* Nothing of the kind has been attempted here, *and it has not even been shown that, when the property in this class was purchased*, the firm had in its possession any of the moneys of the bank which could be reclaimed *in specie*. To give a *cestui que trust* the benefit of purchases by his trustees, it must be satisfactorily shown that they were actually made with the trust funds.' "

In Spokane Co. v. First Nat. Bank, 68 Fed. 979, decided by the circuit court of appeals for this circuit, the rule is laid down as follows:

"Both the settled principles of equity and the weight of authority sustain the view that the

plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant. · Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Association v. Austin (Ala.), 13 South. 908; Shields v. Thomas (Miss.), 14 South. 85; Silk Co. v. Flanders (Wis.), 58 N. W. 383; Slater v. Oriental Mills (R. I.); 27 Atl. 443; Bank v. Armstrong, 39 Fed. 684; Multnomah Co. v. Bank, 61 Fed. 912; Massey v. Fisher, 62 Fed. 958."

68 Fed. 982.

In the case at bar all of the Kansas realty and one-half of the California realty and one-half of the Kansas and California personalty went to Mrs. Fensky upon the death of Ferdinand Fensky. It was shown that Mrs. Fensky had some money of her own at the time of their marriage [Tr. p. 624], and that she subsequently received a bequest from an old sweetheart. [Tr. p. 624.] Complainants were each entitled, at most, to but a very small balance of an undivided one-sixteenth interest in the personal estate and the California realty of Ferdinand Fensky. *This interest was never divided or segregated into a distinct and separate fund.* The principal fraud claimed was relative to the sales contracts of the Kansas realty in Fensky's Addition, but none of the proceeds of these sales contracts has been traced with that degree of certainty required by the foregoing decisions, *or at all, into the California realty deeded to the defendants.* The only

evidence tending in the slightest degree to connect the two is that during the administration of her husband's estate she received, from time to time, and over a considerable period of time, in the years 1903 and 1904, large remittances from the Kansas administrator, and that on September 18, 1907, she was seized of a number of pieces of land in California. Even if we assumed for the purpose of argument only that the sales contracts of the lots in Fensky's Addition constituted personalty, as claimed by complainants, still more than one-half of the moneys received from all sources by Mrs. Fensky from Kansas came to her in her own right as the widow of the deceased. So she had considerable funds of her own free and clear of any claims of her husband's other heirs. When the land deeded to defendants on September 18, 1907, was acquired (except that deeded to Mrs. Katzung) is left wholly to the imagination; and whether or not it was acquired with money in which appellants could possibly trace the alleged balance of their undivided one-sixteenth interest, or with the proceeds of the Kansas realty, which descended direct to the widow (a large part of which was not covered by any contract to sell), or with her undisputed portion (½) of the California realty and (½) of *all* the personal property both in Kansas and California, or with other funds of Mrs. Fensky, is entirely a matter of conjecture, and not of proof. As to the land deeded to Mrs. Katzung, this land was distributed to Mrs. Fensky from the estate of Ferdinand Fensky and consequently could not pos-

sibly have been purchased with the proceeds of any Kansas personal property to which appellants could in any event have any possible interest.

As stated in Ferris v. Van Vechten, *supra:*

> *"It does not suffice to show the possession of the trust funds by the trustee, and the purchase by him of property—that is, payment for property generally by the trustee does not authorize the presumption that the purchase was made with trust funds."* (P. 120.)

In that case the proof of tracing was very similar to the proof in the case at bar. It was shown that large sales of real estate of the testator had been made by the executors on account of which they had realized large sums of money. It also appeared that large amounts of money arising therefrom were applied in keeping the homestead farm (upon which a trust was sought to be charged) in repair, and in paying interest and taxes thereon. But, as stated by the court:

> "There was no proof that one dollar of the moneys received for lands, and which constituted the trust fund, was paid or applied to any of the purposes mentioned. * * *."

Appellants' and Intervenor's Supposed Cause of Action Growing Out of the Alleged Fraud of Mr. Campbell and Jeanette Fensky Is Barred by the Statute of Limitations.

The statutory period within which an action may be brought for relief on the ground of fraud is three years and "the cause of action in such case (is) not

to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Code of Civil Procedure (Cal.), Sec. 338, Subdiv. 4.

The burden of proof is upon appellants not only to allege but to prove that they had no knowledge of the alleged fraud until within three years before the commencement of the action.

Lady Washington Con. Co. v. Wood, 113 Cal. 482.

The provision of the statute regarding discovery is derived from the principles of equity jurisprudence. The rule in equity is that *knowledge of facts which would put a reasonably prudent man on inquiry is equivalent to discovery,* and our statute and similar statutes have been construed in the light of this rule.

Lady Washington Consolidated Co. v. Wood, 113 Cal. 482;

Rugan v. Sabin, 53 Fed. 415, 419 (C. C. A., 8th Cir.);

Redd v. Brun, 157 Fed. 190, 192 (C. C. A.).

The bill of complaint in this action was filed almost *eleven years* after the commission of the alleged initial fraud upon which appellants' claim for relief is attempted to be grounded, *ten years* after they made the assignments of all their interest in the estate of Ferdinand Fensky to his widow, which they now seek to

have this court set aside, and more than *six years* after the death of said widow. The statutory period of three years had run several times over. *Prima facie* appellants' alleged cause of action is barred. The only ground upon which appellants can ask the court to investigate their belated claims is that they excusably failed to discover the alleged frauds complained of or of any facts which would put them upon inquiry until within three years before the commencement of their action.

When this case was before this court before, strictly upon the bill of complaint (242 Fed. 363), this court felt that it was bound by the allegation of appellants in their bill of complaint that they did not discover the alleged fraud or have any notice or suspicion of the amount or value of the estate of their deceased brother until July, 1912. We quote the following extract from the previous decision of this court:

> "The bill of complaint in this case was not filed until July 8, 1914. With the releases and quitclaims executed by the complainants in 1904, standing against their cause of action for alleged fraudulent acts in dealing with the estate of Ferdinand Fensky, *the statute of limitations and the doctrine of laches would be a bar to this suit, but for the allegation in the bill that not until late in the summer of 1912 did the complainants, or either of them, have any notice or suspicion of the truth respecting the amount, extent, and value of the estate of their deceased brother*, or of the frauds and fraudulent conduct of M. T. Camp-

> bell, Jeanette Fensky, and J. H. Merriam in dealing with the said estate in the matters charged in the bill of complaint. This discovery is alleged to have been made in July, 1912, * * *."
>
> 242 Fed. 363, at 367.

This court also held that it having been alleged in the complaint that appellants' ignorance of the fraud had been produced by affirmative acts of Mr. Campbell and Jeanette Fensky in concealing the facts from them, that it was not necessary for them to allege in what way the discovery was made so that the court might clearly see whether by ordinary diligence the recovery might not have been made before, relying upon the rule laid down in Bailey v. Glover, 88 U. S. (21 Wall.) 342, 347.

Since at the trial the allegations of the complaint as to the time of discovery of the alleged fraud and the alleged concealment of such fraud were not only not proven, but are contrary to the weight of the evidence, it is manifest that appellants' claim for relief on the ground of fraud is many times over barred by the statute of limitations.

It appears positively and conclusively that not only did appellants have actual knowledge of the existence of the land contracts covering property in Fensky's Addition, at the time of their voluntary assignments of their interests in the estate of Ferdinand Fensky to his widow, but also they were expressly advised by Mr. Campbell of the existence of such contracts,

at the same time being informed of Mr. Campbell's positive belief that they were real property descending direct to the widow, in which they, as heirs, were not interested.

As before stated, Louisa Pickens resided in Topeka, Kansas, since 1876 [Tr. p. 266], and visited her brother, Fred Fensky, from time to time [Tr. pp. 276, 282], who lived in Fensky's Addition, whose only business was planning and building houses, principally in Fensky's Addition [Tr. p. 275], and selling them on contract. [Tr. pp. 506, 361, 277.]

Mrs. Kraus, a sister of appellants, and her husband, Oscar Kraus, also had lived in Topeka for a long time. He had been a business man there since 1869 [Tr. p. 277] and were in close touch with Ferdinand Fensky while he lived in Topeka. [Tr. pp. 274, 277-8.] It also appears that Mrs. Schutt not only corresponded with her sister, Mrs. Kraus, who lived in Topeka, Kansas, at about the time she executed her assignment to Jeanette Fensky, the widow, but it also appears that Mrs. Schutt was in Topeka during the time that Fensky's Addition was being laid out, and when it was being built up. [Tr. p. 278.] Both Mrs. Schutt and Mrs. Pickens relied upon the information and advice given them by their brother-in-law, Mr. Kraus. [Tr. pp. 273, 279.] Mrs. Krauss knew of the Fensky Addition, that her brother was building houses on this addition and selling them, knew the names of some of the purchasers, that there was no one else building houses there for the purpose of sale. [Tr. p. 277.]

Mrs. Pickens and Mrs. Schutt had the same opportunities to know these facts, and surely knew them. It is absurd for these two sisters, who were in Topeka when this addition was being built up by their brother, Ferdinand Fensky, and who visited him at his home in Fensky's Addition, to say that they did not know his business was planning and building and selling the houses in that addition.

In addition to this, the following extract from the testimony of Mr. Kraus, who was the advisor of appellants, shows that Mr. Campbell informed him of the existence of these land contracts:

"Q. Did Campbell ever mention to you anything about the contracts of sale of real estate in Fensky's addition and elsewhere?

A. He said to me those transactions in the so-called Fensky addition were all real estate and that we had nothing to do with that.

Q. That the heirs had nothing to do with that?

A. Yes, the heirs here in Kansas.

Q. Did Mr. Campbell in any conversation with you say anything about what interest the brothers and sisters of Ferdinand Fensky had in the contracts for sale of lots in the Fensky addition?

A. He told me we had nothing to do with those affairs in the addition." [Tr. p. 269.]

In addition to this, the sale of lots in the Fensky Addition by Ferdinand Fensky "was advertised in a public way in the newspapers and otherwise," and there was a big sign over the north end of the bridge, indicating that the lots in the Fensky Addition were for

sale. That was his home place and was on a public thoroughfare. [Tr. p. 274.]

In addition to this, Fred Fensky, a brother of appellants, in July, 1904, and *a few days prior* to the time that appellants assigned their interests in the estate of Ferdinand Fensky to Jeanette Fensky, the widow (compare letter of Campbell dated July 24, 1904, referring to Fred Fensky [Tr. p. 399] with assignments by appellants [Tr. pp. 583-4] dated July 29, 1904, and August 3, 1904) came over from Leavenworth, Kansas, his home, to Topeka, and made an investigation of the estate of Ferdinand Fensky, got a written statement from Campbell as to the assets of the estate as inventoried [Tr. p. 275] and "went to Fensky's Addition and looked over the property". He called upon Mr. Campbell and quizzed him about the land in Fensky's Addition and the number of houses built, etc., and "trenched very closely on the idea" that the land contracts were personalty. [Tr. p. 399.]

Fred Fensky was the first one who asked Mr. Campbell particularly about the addition property. [Tr. p. 399.] He was informed by Mr. Campbell that most of the addition people had deeds to their property, whereupon Fred Fensky "wanted to know why the notes and mortgages taken from them were not personal property of the estate". Mr. Campbell "explained to him" that they were made to Jeanette Fensky and were her individual property, and that the real estate belonged to Mrs. Fensky "individually and the estate had nothing to do with it." [Tr. p. 399.]

At this point we wish to point out that the mortgages referred to given to Mrs. Fensky individually by the holders of the land contracts in Fensky's addition were made a matter of public record, and although the deeds given to these contract purchasers at the time were dated prior to the death of Ferdinand Fensky, the deeds and the mortgages back were publicly recorded *in each instance on the same date,* and the public record of the mortgages showed that they were not only dated, but acknowledged and recorded *subsequent* to the death of Ferdinany Fensky.

(Compare list of recorded deeds of Ferdinand Fensky and wife to others on pp. 322-4 of the transcript with recorded list of mortgages to Jeanette Fensky, as set out on pp. 325-6 of the transcript.)

These public records which were open to inspection by appellants manifestly showed upon their face that the mortgages referred to by Fred Fensky were *purchase-price mortgages* and that the contracts relating to the same were executed prior to the death of Ferdinand Fensky. The question propounded to Mr. Campbell by Fred Fensky of Leavenworth, above referred to, clearly indicates that he had knowledge of these facts. He stayed at the home of Mr. and Mrs. Kraus during the two days he was in Topeka doing nothing but investigating these questions, and he talked to Mr. and Mrs. Kraus about what he was doing. [Tr. pp. 275, 277.] It is reasonable to presume that Mr. and Mrs. Kraus were informed of all that Fred Fensky had learned, if they did not already know it; also that Mrs. Pickens,

who "depended on Mr. Krauss" and who learned what she knew about the estate from Mr. Kraus, and who was guided in what she did by the action of her sister, Mrs. Kraus [Tr. p. 279], also had full knowledge.

Mr. Kraus *consulted lawyers*, as far back as October 5, 1903, for the purpose of seeing that his wife and appellants herein got their proper share of the estate. [Tr. p. 356.] Their brother, Mr. Fred Fensky of Leavenworth, also employed an attorney by the name of Mr. Jackson, who investigated the legal status of the land contracts referred to and other matters connected with the estate. [Tr. pp. 413, 415, 416, 422.] It also appears that Mrs. Wendt, the sister living in Germany, through the American consul, made an investigation, employing an attorney by the name of Slater, who wrote to California "to learn the condition of the estate in California," and after investigation of the widow's offer, came to the conclusion that her offer "was about the square thing." [Tr. pp. 276, 423, 424.]

Can it be doubted from the foregoing facts but that appellants had actual knowledge of the existence of the land contracts in question? Having such knowledge, they were charged as a matter of law with knowledge of their legal effect on the title of Ferdinand Fensky at the time of his death. We believe the record justifies the conclusion that the attorneys who were consulted by the various brothers and sisters advised them that these contracts had no effect upon the title of Ferdinand Fensky and that the lands covered thereby descended direct to the widow and that such advice was communi-

cated to appellants at or about that time, to-wit: 1903-1905. Certainly it cannot be doubted that appellants had knowledge of facts which, if they had pursued with the slightest diligence, would have at once disclosed the existence of these land contracts and their legal effect. Certainly appellants cannot now truthfully say, as is alleged in their complaint, "that until late in the summer of 1912 they did not, nor did either of them, have any notice, knowledge or suspicion" of the existence of these contracts.

As to the value of the real property in California, which appellants claim was fraudulently represented to them to be worth far less than the real value thereof (but which the record shows was represented only to be "appraised" at the amount for which said real property was actually appraised), the description of these lands appeared of record in the inventory in the estate of Ferdinand Fensky in California, and nothing was done by anyone to prevent appellants from making inquiry as to the actual value of these lands. In fact, it appears that Mr. Slater, the attorney for the sister in Germany, did investigate the estate in California [Tr. p. 424], of which fact Mr. Kraus was informed by Consul Bischoff. [Tr. p. 276.]

It cannot be said that either Mr. Campbell or Jeanette Fensky ever did, or attempted to do, anything to conceal from appellants knowledge of the true value of the California real property. The intervenor and another nephew of appellants were in California at the time of the death of Ferdinand Fensky. [Tr. p. 625.]

With every means of securing information open to them, if they refused to make inquiries for over eight years they certainly must be held to come within the rule laid down in Phelps v. Grady, 168 Cal. 73, at page 79, from which we quote the following:

> "It cannot be said, therefore, and of course it is not alleged, that Mrs. Phelps ever did or attempted to do anything to conceal from these intervenors knowledge of the true value of the land. If, under such circumstances, with every means of information open and patent before them, they may refuse to make inquiries for seven years, they may do so for seventy. There is an absolute failure to show not only due diligence but any diligence in seeking to discover during all this intervening time whether or not they had parted with their property at a fair valuation. The fact that they lived at a distance is of course no excuse. They were under no other disability."

The supreme court of the United States, in the case of Broderick's Will, 88 U. S. 503, 22 L. Ed. 599, said:

> "Parties cannot thus by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitudes to which they are subject." (21 Wall. 519.)

Neither the intervenor, Charles Fensky, whose father (also named Charles Fensky) was a brother of Ferdi-

nand Fensky, nor appellant Mrs. Schutt, testified at the trial. His complaint in intervention, seeking relief similar to that of the complainants, was filed at the *close* of the trial. [Tr. pp. 186-7.] His father died about September, 1907, [Tr. 188, 267.] *There is absolutely nothing in the record even indicating that appellant Schutt, and the intervenor and his father, did not have actual knowledge ten years or more ago of the matters and things now relied upon by them in seeking relief. Clearly, therefore, under the cases cited, the alleged cause of action of the appellant Johanna Schutt and the statutes of limitations, and we submit that the same is also true as to appellant Louisa Pickens.*

Appellants and the Intervenor Charles Fensky Are Barred by Their Own Laches from Any Recovery on the Ground of Fraud.

What has just been said relating to the statute of limitations applies also to the subject of laches, because in determining whether or not a claim is stale and barred by laches, courts of equity follow the analogy of the statute of limitations. We concede that the defense of laches is not available unless the lapse of time has resulted, or is presumed to have resulted, in prejudice to the appellees. But we submit that *the record shows not only actual prejudice to appellees by the great delay of appellants in commencing this action, but shows such circumstances that prejudice would be presumed from the great lapse of time, even if actual prejudice had not been proven.*

Prejudice may be presumed from mere lapse of time (Cahill v. Superior Court, 145 Cal. 42, 48), or from other circumstances showing that a change in position *might* have occurred (McNeill v. McNeill, 170 Fed. 289, C. C. A. 9th Cir. 1909), or if it appears that an important witness has died (Henchman v. Kelly, 54 Fed. 63, at page 666, C. C. A. 9th Cir.; Foster v. Mansfield Co., 146 U. S. 88, 100; Socrates, etc. v. Realty Co., 130 Fed. 293, 297, C. C. A. 9th Cir.).

It is stated in Kelly vs. Boettcher, 85 Fed. 65, 72 (C. C. A. 8th Cir) that if the statutory period has run "the burden is on plaintiff to show why it should be extended. It is on the complainant to show by suitable affirmance in his bill that it would be inequitable to apply it [laches] to his case." And so appellants must show not only lack of knowledge of the alleged facts upon which they ground their claim for relief, or of any facts putting them upon inquiry, but must also show that they have exercised the geratest diligence in discovering the facts and filing their bill of complaint. (Hardt v. Heidweyer, 152 U. S. 547, 548.)

When this case was before this court before, merely on the bill of complaint, the court being confined to the allegations appearing in the bill of complaint, held that it did not appear from the allegations of the complaint that the action was barred by laches. On this appeal, however, there is no such limitation or handicap.

As already pointed out, about eleven years have elapsed since the time of the alleged fraud of Campbell and Jeanette Fensky and the filing of plaintiff's bill of

complaint. During that time there have been three decrees in probate and both Mr. Campbell and Jeanette Fensky, the widow of Ferdinand Fensky, who were alleged to have committed the alleged fraudulent acts, have long since been dead, and are not here to protect their good names and characters. The original property of the estate with but few exceptions has been sold and changed in form a number of times, and its identity lost. Appellees herein have made valuable improvements upon the various properties deeded to them respectively by Jeanette Fensky, which appellants attempted to prove (but only by way of conjecture) was acquired with funds in which they claimed a small undivided interest. It appears that Mrs. Farnsworth made expenditures aggregating over $3,000.00 for improvements, interest, taxes and insurance on property deeded to her and which was not covered by the income from the property. [Tr. p. 734.] Appellee Wellke went into possession of the five pieces of property deeded to him by Mrs. Fensky in 1908, upon three of which there were cottages. Since that time some of these properties have been sold and traded by him. He paid the taxes and paid off a mortgage of $1,500.00 on the place where he lives and other expenses in connection with said proptrties amounting to over $800.00 for interest, taxes, retaining wall, grading and other improvements. [Tr. p. 735.] Appellee Schmidt paid off a mortgage amounting to $1,500.00 on the property deeded to him. [Tr. p. 736.]

It has been frequently emphasized by the courts that after the great lapse of time of the *death of important*

witnesses, it is easy for plaintiffs to charge fraud and almost impossible for defendants to meet the charges (Hinchman v. Kelly, 54 Fed. 63, 66, C. C. A. 9th Cir.; Foster v. Mansfield Co., 146 U. S. 88, 100; Socrates, etc. Mines v. Carr Realty Co., 130 Fed. 293, 297, C. C. A. 9th Cir. 1904; Robertson v. Burrell, 110 Cal. 568).

In Robertson v. Burrell, *supra*, the court, commenting on this fact, and the rule of equity, relating thereto, said:

> "Moreover after the lapse of so much time and after the death of all the original parties, equity for the peace of society scrutinizes with great particularity bills such as this and is not satisfied to retain one unless the fullest possible credible showing is made by the applicants for relief. (Citing many other cases. Wood v. Carpenter, 101 U. S. 135, 143.)"

We quote the following pertinent extract from Hinchman v. Kelly, decided by this court:

> "One of the particular reasons which have induced the courts to refuse to act is the difficulty of ascertaining the necessary facts to make it safe for a court of equity to exercise its judicial power, and this is especially so in a case like the one under consideration, when the means of resisting the trust, if unfounded, cannot be obtained on account of the death of the parties. In all cases where the complaining party has slumbered over his rights for a long period of time, with no obstacle in the way to prevent him from asserting them, until the evidence upon which such rights might be ques-

tioned and overthrown is lost, and all the original actors are dead, and their affairs left to heirs or representatives, it is deemed meet and proper that the law, in the exercise of its equitable jurisdiction, should presume it to be unjust, and refuse to allow the complainant to be heard. The peace and safety of society and the property rights of the general public demand this protection. Prevost v. Gratz, 6 Wheat. 498; McKnight v. Taylor, 1 How. 168; Jenkins v. Pye, 12 Pet. 241."

We submit that the foregoing quotations are strictly applicable to the case at bar and that appellants are clearly barred by their own laches.

PART II.

Appellants Are Not Entitled to Any Relief as Alleged Heirs at Law of Jeanette Fensky.

Appellants, realizing the obvious weakness of their alleged cause of action on the ground of fraud, have, in desperation, seized upon the claim that they are heirs at law of Jeanette Fensky, who in the same breath is charged with fraud. Appellants apparently neither see nor feel any indelicacy in their dual position. We submit, however, that they are not entitled to any relief whatsoever as alleged heirs at law of Jeanette Fensky, for the reasons next hereinafter stated.

Decree of Distribution in Estate of Jeanette Fensky, Appellants, Is Valid.

On this collateral attack all presumptions and intendments are in favor of jurisdiction, and the recitals in the

decree, and the evidence introduced show such jurisdiction affirmatively.

The record shows that, on September 22d, 1909, the superior court of Los Angeles county, sitting in probate, made and entered in the matter of the estate of Jeanette Fensky, its decree settling the administrator's final account and for final distribution of the estate, wherein, after reciting that the matter had come "on regularly this day for settlement and hearing," it is ordered, adjudged and decreed that said deceased left surviving as her "only heirs at law" the persons therein named, to-wit, "Eugene Wellke, Alma J. Schmidt and Amanda Katzung," and that the residue of said estate as shown by the final account, "and all other property belonging to said estate, whether described herein or not," be distributed to the persons therein named. [Tr. pp. 663, 664.] The plaintiffs and appellants here were not named in this decree either as heirs or distributees of the estate, and did not take any appeal therefrom. Counsel in his brief seems to concede that appellants are bound by that decree, unless the same can be impeached collaterally, for it is such a collateral attack which he is seeking to justify in the present action.

> Van Fleet on Collateral Attack, Secs. 3 and 4;
> Estate of Davis, 151 Cal. 318, 322-3.

Under the statutes of California, a proceeding for final distribution is a proceeding *in rem,* and jurisdiction is obtained by the giving of a notice either under sections 1633-4, or under section 1668, Code of Civil

Procedure, depending on whether the petition for final distribution is filed with the final account or after the final account. Section 1666 of the same code provides that:

> "In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. *Such order or decree is conclusive* as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal."

The supreme court of California in William Hill Co. v. Lawler, 116 Cal. 359, thus states the nature and effect of a decree of distribution:

> "A proceeding for distribution is in the nature of a proceeding *in rem,* the *res* being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. *By giving the notice directed by the statute the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The*

decree is as binding upon him if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court. (Estate of Griffith, 84 Cal. 107; Daly v. Pennie, 86 Cal. 552; 21 Am. St. Rep. 61.)"

116 Cal. 362..

In addition to the statutory notice that was given, it appears that appellants herein had actual notice of the proceedings on distribution of the estate of Jeanette Fensky. It is admitted by the pleadings that appellants, "through their children and otherwise, during the pendency of the proceedings * * * in the superior court of Los Angeles county, California, involving the administration of the estate of * * * said Jeanette Fensky, paid attention to said proceedings and from time to time secured copies of papers that were filed therein." [Tr. pp. 26-27, 53.] Notwithstanding that the petition for final distribution alleged that appellants Wellke, Schmidt and Katzung, the brothers and sisters, respectively, of the deceased, "are the next of kin and only heirs at law of said deceased [Tr. p. 655], and notwithstanding that if appellants' present contentions that they are heirs at law of the deceased, they would have been entitled to distribution of some part of the estate—although they admit paying attention to said proceedings [Tr. p. 27], appellants made no effort to appear therein to have their claims of heirship adjudicated. Had they done so and had they established their claims (which we submit they could never do) they would have been named in the decree of

distribution as to the properties subsequently distributed, and also been named as parties to the omnibus clause distributing all other property of the deceased whether described in the decree or not. The decree of distribution (rendered October 13, 1909) of all of the estate of the deceased, whether described in the decree or not, to said appellees has become final, no appeal having been taken.

No facts are alleged in the complaint, nor can it be claimed that there was any *extrinsic* fraud in connection with the estate of Jeanette Fensky by reason of which appellants did not contest said petition or did not appear in the administration of said estate.

The first point sought to be made by appellants against the decree, after thus remaining quiescent since October, 1909, is that it is void because of the alleged failure to give the statutory notice of hearing on the final account and petition for distribution. (Secs. 1633-4 Cal. Code Civ. Proc.) In support of this contention, appellants argue that proceedings in probate are special; that no intendments can be made in favor of the jurisdiction of the court; and that everything bearing upon the question of the court's jurisdiction must affirmatively appear in the record. None of these contentions, however, find any support in the law of California.

Under the constitution of California, adopted in 1879, the old probate court established by the constitution of California in 1849 (Art. VI, Sec. 8) was abolished, and original jurisdiction "of all matters of pro-

bate" as well as "in all cases in equity and in all cases at law which involve," etc., were granted to the superior court. (Constitution 1879, Art. VI, Sec. 5.) Since 1879, the superior court, sitting in matters of probate, has been regarded as a court of *general jurisdiction*, and the *same presumptions and intendments* that attach to ordinary judgments of court of general jurisdiction when attacked, prevail.

In re Burton, 93 Cal. 459;
Burris v. Kennedy, 108 Cal. 331;
Estate of Davis, 151 Cal. 318;
McHatton v. Rhodes, 143 Cal. 275, 279;
Robinson v. Fair, 128 U. S. 53, 86.

In Burris v. Kennedy, *supra*, the supreme court of California said, referring to the jurisdiction of the superior court in probate matters:

> *"That court has general jurisdiction derived from the constitution.* We have in this state no probate court, but superior courts are given jurisdiction of all matters of probate just as they are given jurisdiction of cases at law and in equity.
>
> "The grant of jurisdiction in regard to matters of probate is contained in the general definition of the jurisdiction of the court. After stating various classes of cases, or matters of which the court has jurisdiction, it is said, 'and of all such special cases and proceedings as are not otherwise provided for.' The court is not, therefore, while sitting in probate, a statutory tribunal, and does not derive its power from the act of the legislature. Nor are probate proceedings classed by the constitution as special proceedings * * *

> "It (a probate proceeding) is a proceeding *in rem* which is not, in the technical sense, such a special proceeding unknown to the framework of the common law as will change the presumptions which attach to the action of the court, making it *pro hac vice* a court of inferior and limited jurisdiction."

The rule announced in Burris v. Kennedy, *supra*, has never been judicially questioned in California, but has been uniformly applied by the courts.

In Illinois T. and S. Bank v. Pacific Ry. Co., 115 Cal. 296 (cited with approval in Mesnager v. De Leonis, 140 Cal. 402), the California supreme court states the law as to collateral attack thus:

> "It is well settled that as against such an attack, if the jurisdiction of the court can in any event be upheld and its action validated, this will be done even though the facts showing such jurisdiction are defectively stated and inferences must be indulged in to support the judgment. (Van Fleet on Collateral Attack, Sec. 17.)"

The same rule has been repeatedly announced.

In Zilmer v. Gerichten, 111 Cal. 73, 77, it is said:

> "Conceding, however, that the proceeding for confirmation of the sale was irregular as claimed, and that notice of the sale was not published for the time required by the order of court, yet these irregularities or errors in the exercise of unquestionable jurisdiction would not invalidate the sale nor the administrator's deed to the extent of mak-

ing them vulnerable to the collateral attack made upon them in the court below." (Citing many cases.)

We quote from McHatton v. Rhodes, 143 Cal. 275, 278:

"The question as to the presumption of jurisdiction as to a domestic judgment is very fully considered *In re Eichhoff*, 101 Cal. 602, and it is there said: 'The fact that the court has rendered a judgment implies a determination by it before it assumed to hear the controversy, that it had jurisdiction over the subject-matter of the action, and of the defendant against whom the complaint was directed. Its jurisdiction does not exist by virtue of its mere decision that it has jurisdiction, as that would be reasoning in a circle, but the presumption of its jurisdiction exists because it has been authorized to determine this question in the same mode as any other question of fact upon which its judgment is to rest, and its decision thereon is presumed to have been made upon evidence sufficient to sustain it. Its determination upon this question is to be made upon evidence of some nature, and, whether this evidence is sufficient or insufficient to support its conclusion thereon, it has the jurisdiction to make the determination; and if its conclusion is incorrect, it is merely error, which can be reviewed only upon a direct appeal. Even though it should determine the question without any evidence before it, the same presumption of verity attends its decision upon this point as upon any other issue which it may determine without evidence. Nor does this presumption of its jurisdic-

tion to make the decision depend upon the existence of any record of the decision."

Appellants base their attack against the decree upon the ground that an affidavit of posting of notice of hearing appearing on file shows the posting of a notice of hearing for *"July* 22nd, 1909," instead of for *September* 22nd, 1909," as fixed. [Tr. p. 661.] It does not appear from the record, however, that no other *proof* of posting was before the court on the day when it made and entered its decree. *Nor does it anywhere appear that in truth and in fact a correct notice was not posted in all respects as required by law.* It is the *fact of the posting of the notices,* and not the proof of posting which confers jurisdiction. (Herman v. Santee, 103 Cal. 519, 523; In re Newman, 75 Cal. 220.) From aught that appears in the record, the court at the time it entered its decree had before it ample evidence that a proper notice of hearing had been posted. (Sacramento Bank v. Montgomery, *supra.*) The decree itself recites that the matter had come on *"regularly this day for settlement and hearing."* If a proper notice had not been in fact given, this recital would have been false; but under the decisions above cited, upon this collateral attack, the recital in the decree must be conclusively presumed to speak the truth.

Section 1638 of the Code of Civil Procedure of California reads as follows:

"The account must not be allowed by the court until it is first proved that notice has been given as

Stead, vs. Curtis, 205 Fed. 439, at pages, 448 to 450 decided by C.C.A., 9th. Circuit

> required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, *and is conclusive evidence of the fact.*"

In the instant case the decree of distribution had combined with it the decree settling the final account to which alone the above section applies. But as the same identical notice was required, when both the final account and the petition for distribution are filed together (Secs. 1633-4, Cal. Code of Civil Procedure) the effect of the recital is the same.

Under the foregoing recital in the decree, it clearly appears that proof that notice had been given as required by the statute, was made to the satisfaction of the court, and such recital is therefore *conclusive*. Irrespective of the foregoing statute, the foregoing recital in the decree of distribution if not conclusive (as some of the cases hereinafter hold) is entitled to the greatest weight; and unless *it affirmatively and positively appears that notice was not posted, as required by the statute, it will be presumed that due and proper notice was given.*

In Estate of Davis, 151 Cal. 318, it was sought to collaterally attack the decree admitting a will to probate upon the ground that the hearing was originally noticed for November 30, 1896, while the order admitting the will to probate was entered on August 17, 1897, and that the record did not show any order or orders continuing the hearing. The decree, however, recited (as was done in the decree under consideration) that *the*

matter had come on regularly for hearing before the court. In its judgment sustaining the decree the California supreme court says:

> "We find no provision in our statutes indicating that any orders continuing the hearing form a necessary part of the judgment-roll or 'technical record.' But even if they do, their absence would not invalidate the order admitting the will to probate. At most, the record is silent on the question of whether such orders were made, and in the case of a court of general jurisdiction, when a judgment 'comes in question collaterally, service will be presumed when the record is silent.' (Van Fleet on Collateral Attack, Sec. 830.) If, as contended by appellants, such orders form a part of the notice to which parties interested are entitled, *the recitals in the order admitting the will to probate, that the petition came on regularly for hearing, and that notice had been given 'as required by law,' are sufficient to justify the presumtion that such orders were made, where the contrary does not affirmatively appear from record.* (People v. Davis, 143 Cal. 673 [77 Pac. 651]; Sacramento Bank v. Montgomery, 146 Cal. 745, [81 Pac. 138].)
>
> "This case does not come within the rule that where a service appearing in the record is insufficient it will not be presumed that any different and other service was made. This rule *'has no application where the record does not purport to show ALL that was done, and the judgment states that all that was necessary to be done was done.'* (Sacramento Bank v. Montgomery, 146 Cal. 745, [81 Pac. 138].)"
>
> 151 Cal. 325-6.

Again, in Estate of Chapman, 158 Cal. 740, at p. 741, the supreme court of California said:

> "The appeal is based on the proposition that the order of February 7, 1908, discontinuing the family allowance from and after October 4, 1907, was absolutely void because the court had no power to make it. This contention is founded on the assertion that it was made *ex parte,* and without any notice to the widow. The record contains nothing to that effect. The order recites that it was made upon good cause, but neither the recital nor anything else in the record before us states anything at all on the question whether or not notice thereof was given. *Orders in probate proceedings need not recite the existence of the facts upon which jurisdiction to make them depend.* (Code Civ. Proc., Sec. 1704.) The order was appealable and it has become final. The attack upon it was and is wholly collateral. The presumption in regard to such orders, upon such collateral attack, is the same as in other cases; *the jurisdiction of the court to make them is presumed, unless the contrary appears from the record,* or from competent evidence in a proper attack. Upon this record we must presume that the necessary notice was given and that the order discontinuing the family allowance was valid and binding." (pp. 741-2.)

In Robinson v. Fair, 128 U. S. 53, 86, the court said:

> "It remains to consider whether the decree of partition is void upon grounds other than those relating to the constitutionality of the statute under which the probate court proceeded. The circuit court of the United States had no jurisdiction

to set aside that decree, merely upon the ground of error, nor could it refuse to give it full effect, unless the probate court was without jurisdiction of the case. * * * And in determining the question of jurisdiction, it must be remembered that probate courts of California have had for many years the rank of courts of general jurisdiction, and, as said in Burroughs v. De Couts, 70 Cal. 361, 372, their proceedings, 'within the jurisdiction conferred upon them by the law, are to be construed in the same manner and with the like intendments as the proceedings of courts of general jurisdiction, and their judgments have like force and effect as judgments of the district court.' Probate courts being, then, courts of superior jurisdiction, in respect to the settlement, distribution and partition of estate coming within their cognizance, *the recitals in the decree of partition unless contradicted by the record, will be presumed to be correct,* and every intendment will be indulged in its support." (Citing cases.)

Hall v. Law, 102 U. S. 461, was a collateral attack upon a decree of partition. The supreme court of the United States said:

"The validity of this partition is assailed because no complaint or petition of the applicant for the partition appears in the record as the foundation of the proceedings, and without one it is contended that they were void."

"*The recitals in the order show a compliance with the statute; they show jurisdiction in the court over the subject.* That jurisdiction arises upon the presentation of the application, accompa-

nied with proper proof of proper notice of it. *The order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given. This conclusion is not open to collateral attack; it can only be questioned, on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review.*

In Applegate v. Lexington, etc. Mining Co., 117 U. S. 255, 259, the court said:

> "The court which made the decree in the case of *Clark v. Conkling* was a court of general jurisdiction. Therefore, *every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction. Kempe's Lessee v. Kennedy*, 5 Cranch, 173; *Voorhees v. Bank of the United States*, 10 Pet. 449; *Grignon v. Astor*, 2 How. 319; *Harvey v. Tyler*, 2 Wall. 328. *It is to be presumed that the court before making its decree took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed.* That this presumption is authorized will appear by the following cases: * * *"

In Johnson v. Canty, 162 Cal. 391, one of the links in the plaintiff's chain of title was a decree of distribution, and the plaintiff accordingly offered in evidence a certified copy of such decree, to the admission of which the defendant objected upon the ground that there was "no showing that the court had acquired jurisdiction of the estate." The trial court overruled the objection, and this ruling was assigned as error.

The supreme court of California in affirming this ruling, said:

> *"It is well settled in this state that the same presumption exists in favor of the acts of the superior court done in the exercise of its probate jurisdiction, as exists in favor of its acts in ordinary litigation between parties.* It is provided by our statute that it is to be presumed that a court or judge acting as such * * * was acting in the lawful exercise of his jurisdiction.' (Code Civ. Proc., Sec. 1963, Subd. 16.) It is to be borne in mind that *we have no statute prescribing, as in the ordinary action, what papers shall constitute 'the judgment-roll' or 'record' of a judgment or order in probate proceedings in the courts of this state. We can see no good reason why a decree like the one received in evidence in this matter should not be held to afford presumptive evidence of the jurisdiction of the court to render it.* In Estate of Schandoney, 133 Cal. 387, [65 Pac. 877], this court applied the presumption above stated in a guardianship proceeding, quoting Freeman on Judgments, section 124, as follows: 'Nothing shall be intended to be out of the jurisdiction of the superior court but that which expressly appears to be so. Hence, *though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared.'* (See, also, Estate of Eikerenkotter, 126 Cal. 54, [58 Pac. 370].) It is expressly provided by our statute that a certified

copy of a decree of distribution must be recorded in the county recorder's office (Code Civ. Proc., Sec. 1719), and that from the time of such filing, notice is imparted to all persons of the contents thereof. (Code Civ. Proc., Sec. 1706.) *It thus appears to have been contemplated that the decree itself should afford evidence of the transmission of the title of deceased.* It is expressly provided by section 1704 of the Code of Civil Procedure: 'Orders and decrees made by the court, or a judge thereof, in probate proceedings, *need not recite the existence of facts,* or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute book of the court.'"

162 Cal. 395-6.

It will be observed from the case last cited, that *the technical record of the decree of distribution consists only of the decree itself*, and consequently, that *the affidavit of posting of the notice of the hearing, is not a part of such technical record.* The rule that where the record recites what was done, that it will not be presumed that anything else or different was done, therefore has no application to the erroneous affidavit of posting relied upon by appellants.

The statute of California nowhere provides for the filing of an affidavit of posting. The affidavit of posting is mere evidence to be adduced at the hearing in

order that the court may determine that jurisdictional notice has been given. There may be a number of affidavits or other evidence from which the court could determine the sufficiency of the notice given. It does not appear that the recital in the decree of distribution here involved was at all based upon the erroneous affidavit in question. It may have been made to appear, and we submit that upon the evidence hereinafter pointed out it did appear to the court that another affidavit showing due posting was filed, and that the recital was based upon the fact.

In this connection we wish to quote the following extract from Sacramento Bank v. Montgomery, 146 Cal. 745, where the statute required the return of summons to be made within three years after the commencement of the action, and the only affidavit or return found on file appeared to have been filed after the expiration of three years. The court, in upholding the validity of the judgment, said:

> *"But such affidavit is not the only evidence upon this subject. The jurisdictional recitals in the judgment also constitute a part of the record, and it is there solemnly declared that the default of the defendant R. H. McDonald has been regularly entered according to law.* Assuming here the soundness of defendants' argument to the effect that the court lost all jurisdiction of the case if an affidavit of publication was not filed within the three years, this recital could not be true if no affidavit had been filed prior to the one con-

tained in the record. *The whole record must be construed together, and the jurisdictional recitals in the judgment must be taken on collateral attack as true,* unless the record affirmatively shows that the facts upon which they are based are insufficient to sustain them. The remainder of the record does not show this. *It does not appear that the recital that default was regularly entered according to law was at all based upon the affidavit contained in the record. For aught that appears, it may have been made to appear to the court in that action that another affidavit showing due publication was filed within the proper time, and the recital may have been based upon the fact. Such affidavit may have been lost or omitted from the record. Such a condition of affairs is entirely consistent with the whole record before us, and in support of the judgment must be assumed to have existed. To hold otherwise would be to make the record in part speak falsely.*"

146 Cal. 751.

These appellees are not dependent upon the finding of the requisite jurisdiction of the probate court contained in the decree and the presumptions and intendments in favor of jurisdiction, for the record shows that in truth and in fact the notice which was actually posted truly stated the date fixed for the hearing of the petition for distribution. The witness Glaze, a deputy county clerk whose duty it was to post the proper notice [Tr. 739] and who alone was posting such notices for the county clerk at the time [Tr. 745], testified that after the date of

the hearing had been fixed it was the uniform practice to endorse the date actually fixed on the back of the petition. [Tr. 739.] The petition in the case at bar shows that the true date of hearing was endorsed at the foot of the petition [Tr. 657] and also on the reverse side. [Tr. 660.] It was also Mr. Glaze's uniform practice to fill in the date of hearing set for the petition in the printed form of notice [see Tr. 747] actually posted from the notation endorsed at the foot of the petition and also on the reverse side as aforesaid. [Tr. 739-40.] Since at its foot and on the reverse side of the petition it showed a correct endorsement of the true date of the hearing, and the date of the hearing in the notice actually posted was filled in by Mr. Glaze [Tr. 739-40], from the date endorsed on the face and on the reverse side of the petition, it must be inferred that the notice actually posted contained the true date of the hearing. It is the notice actually posted that is material, and not the copy of the notice set forth in an affidavit of posting.

Furthermore, the register of actions of the county clerk of the Estate of Jeanette Fensky introduced in evidence [Tr. pp. 741, 742] contains the following entries:

"Sept. 11 Notices et. final acct. hearing pet. & aff. filed.
" 13 " hearing pet. for dis. filed.
" 22 Decree showing due Notice filed 12/134.
" 22 Aff. and decree filed 12/135."

It is to be noted that in the entries for September 11 and 13 that the word notice*s* is used in the plural,

and also that an affidavit relating to notices was filed on September 11 and another affidavit on September 22, and that on September 22 a decree showing due notice was filed. Mr. Glaze also testified that the entries in the register of actions were made "from the papers found on file." [Tr. 745.]

Moreover, the record shows that three days after the filing of the final account and petition for distribution, the administrator filed a supplemental petition for distribution, and the record shows without conflict that notice of the hearing on this petition was given for ten days, as required by law. The witness Charles Glaze testified that "on that date (September 11th, 1909) I posted notice of the supplemental petition for final distribution." [Tr. p. 740.] Appellants contend, however, that the court was without jurisdiction to hear this supplemental petition for distribution, because it was not filed *with* the final account as authorized by section 1634 of the Code of Civil Procedure, and attempt to support that contention by the citation of authorities. While it may be true as a general proposition that a petition for distribution is premature if filed before the settlement of the final account, unless it is filed *with* the final account, in the instant case a petition for distribution was in fact filed *with* the final account. This empowered the court to order distribution on the 22nd day of September, 1909. The so-called supplemental petition was in all respects identical with the original petition on file, with the exception that it recited a gift by the decedent during

her lifetime of a certain promissory note, which had been subsequently collected, and with the written consent of the heirs the administrator asked leave of court to pay to the donee of the note in question the amount of the same. The petition was, therefore, at most simply an *amended* petition, and not a new petition, and the same was set down for hearing and heard on the same day with the original petition. [Tr. p. 663.] The donee of the note in question would have had the absolute right to appear at the date of the hearing of the petition for distribution and apply to have the proceeds of said note paid over and distributed to her; and this was the sole purpose of the administrator in filing his so-called supplemental petition.

In the face of this showing upon the register of actions and the testimony of the deputy county clerk above referred to, and the recital in the decree of distribution of "the final account and petition for distribution herein * * * *coming on regularly this day for settlement and hearing*, and no person appearing to except to or contest said account or said petitions, *the court after hearing the evidence* settled said account and orders distribution of said estate as follows" [Tr. 663], we submit that the record affirmatively shows that proper notice was posted and that the court on the day of the hearing upon sufficient evidence determined such to be the fact, as shown by the recital in the judgment and also by the "decree showing due notice" filed September 22, referred to in the register of actions.

The cases cited by appellant relating to the presumptions arising on collateral attack of probate decrees in California, were decided prior to the adoption of the Constitution of 1879, or have been overruled. The case of Estate of Sharon, 179 Cal. 447, particularly relied upon by appellants in support of their claim that no presumptions should be indulged in in support of the jurisdiction of the court, was not a probate proceeding but was an adoption proceeding. Such a proceeding is special and is more in the nature of a private contract than a judicial proceeding, as is shown by the following extract from the decision:

> "The right to adopt a child, and the right of a person to be adopted as the child of another, are wholly statutory. Such right is unknown to the common law. He who claims that an act of adoption has been accomplished must show that every essential requirement of the statute has been strictly complied with. (*Ex parte* Clark, 87 Cal. 641 [25 Pac. 967]; *In re* Stevens, 83 Cal. 331 [17 Am. St. Rep. 252, 23 Pac. 379].) In Estate of Johnson, 98 Cal. 531, 538 [21 L. R. A. 380, 33 Pac. 460], after careful consideration of the question as to what requirements are essential, the conclusion was stated as follows: *'The proceeding is essentially one of contract between the parties whose consent is required.'* "
>
> 179 Cal. 454.

The other case upon which appellants particularly rely, to-wit, Beckett v. Selover, 7 Cal. 233, was overruled by the many later cases cited, and was specifi-

cally repudiated in Irwin v. Scheiber, 16 Cal. 500, 503, 505-6.

Section 1638 of the Code of Civil Procedure, relied on by appellants, was not only complied with as shown by the recitals in the decree, but by its terms relates only to a decree settling an "account" and not to a decree of distribution, which is governed by section 1704 of the same code, which specifically provides probate decrees need not recite any facts showing the jurisdiction of the court. That section, alone, governs decrees of distribution.

Estate of Chapman, 158 Cal. 740;
Johnson v. Canty, 162 Cal. 391.

We wish also to point out that Beckett v. Selover, *supra,* relied upon by appellants, was decided *before* the enactment of section 1704 C. C. P., and *before* the adoption of the Constitution of 1879, since which time the superior court sitting in probate has uniformly been held to be a court of *general* jurisdiction.

The Decree of Distribution in the Estate of Jeanette Fensky Conclusively Adjudicated that Appellees Wellke, Schmidt and Katzung Are the "Only Heirs at Law" of Jeanette Fensky.

Not only was the superior court required by sections 1665 and 1666 of the Code of Civil Procedure to name in the decree of distribution "the persons and the proportions or parts to which each shall be entitled," but the decree of distribution in the case at

bar did adjudicate "that said deceased left surviving as her only heirs at law the following brother and sisters, to-wit, Eugene Wellke, Alma J. Schmidt and Amanda Katzung," and distributed the property described in the decree "and all other property belonging to said estate whether described herein or not," to said appellees. [Tr. pp. 663-664.] Said proceeding is *in rem* to which all the world was a party, including appellants, and the statute also provides "such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal." California Code of Civil Procedure, Sec. 1666.

The William Hill Co. v. Lawler, 116 Cal. 359.

In the case last cited, it was held that the decree of distribution is binding upon all persons whether they appear in the estate or not. It therefore follows that the decree is *res adjudicata* as to who are the heirs at law or Jeanette Fensky.

Appellants claim that the administrator Merriam, one of the appellees herein, had actual knowledge that they were heirs at law of Jeanette Fensky, and by representing in the petition for final distribution that appellees Wellke, Schmidt and Katzung,—the surviving next of kin,—were the only heirs at law of said deceased, acted fraudulently and falsely, and in effect, that the finding of the court is based upon perjured testimony. We respectfully submit that there is nothing in the record showing any knowledge upon the

part of appellee Merriam that appellants were heirs at law, or claimed to be heirs at law. Furthermore, that in truth and in fact, as is pointed out in the next subdivision of this brief, appellants never were in fact heirs at law of Jeanette Fensky, under subd. 8 of section 1386 of the Civil Code of California, under which they claim. To charge defendant Merriam with such knowledge, the court would have to presume facts not proven, and charge the defendant Merriam as a matter of law with knowledge as to the sources from which the deceased originally acquired the property left by her at her death. The various limitations and restrictions on the subdivision of section 1386 are pointed out, together with their application to the case at bar, in the next subdivision.

We submit that the entire record of the adminstration of the estate of Jeanette Fensky shows throughout that administrator Merriam correctly and in good faith regarded the next of kin of Jeanette Fensky as her only heirs at law, and that everything that was done in the administration of said estate was done with their approval and consent. It is admitted by the pleadings that appellees paid attention [Tr. p. 27] to the administration proceedings in said estate, and if they failed to have their heirship established therein, it was their fault and not the fault of appellee Merriam.

Assuming for the sake of argument, that there was any false testimony as to who were the heirs at law of the deceased (which there clearly was not), such

would be intrinsic fraud, not a ground for relief in a court of equity.

United States v. Throckmorton, 98 U. S. 61, 65, 25 L. Ed. 93.

Complainants Have Not, and Never Had, Any Rights as Heirs of Jeanette Fensky Under Paragraph 2 of Subdivision 8 of Section 1386 of the Civil Code of California.

The provision of the statute relied upon by appellants reads as follows:

> "If the deceased is a widow, or widower, and leaves no issue, *and the estate, or any portion thereof, * * * was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property* goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation."

(1) In Estate of Brady, 171 Cal. 1, it was held that this subdivison applies to the *identical property* and also to any property into which it may have been converted, *if it can be traced.* Of course, property of the surviving spouse, not proven to have been received (1) *by descent,* (2) *from the pre-deceased spouse,* or to

be the proceeds or avails of such property, goes to the blood relatives alone of the surviving spouse under other provisions of section 1386, C. C. (Estate of Watts, 179 Cal. 20.) But, as is elsewhere in this brief pointed out, complainants have failed to trace, with that degree of certainty required, or at all, any of the property of Ferdinand Fensky at his death into any particular property of Mrs. Fensky at the time of her death. In the absence of such proof, under the foregoing authorities, subdivision 8 of section 1386 of the California Civil Code is inapplicable to any of the estate of Jeannette Fensky.

(2) Neither does the section apply to property which the surviving spouse has by deed *inter vivos* or by will disposed of during the lifetime of such surviving spouse. The heirs of the predeceased spouse during the lifetime of the surviving spouse have nothing more under this subdivision than an "expectancy," which is defeated if the surviving spouse either during her lifetime deeds the property away or disposes of it by will. The Legislature has simply enacted a rule of succession in regard thereto, in the event the surviving spouse dies intestate *without having previously disposed of the property.*

Estate of Brady, 171 Cal. 1;
Veirs v. Roberts, 28 Cal. App. Dec. 297.

Mrs. Fensky deeded away practically all of her California property to the defendants herein; it therefore follows that, even though complainants had been suc-

cessful in tracing and showing that such property, or some part thereof, was the "proceeds or avails" of separate property of Ferdinand Fensky at the time of his death, which came to Mrs. Fensky *by descent*, subdivision 8 of section 1386 of the California Civil Code would still not be applicable, or of any avail to complainants.

(3) Subdivision 8 of section 1386, California Civil Code, is not applicable in any event to the larger portion of the estate of Jeanette Fensky for still further reasons:

(a) The statute does not apply to the one-half of the Kansas realty (including the lots covered by the sales contracts) which Jeanette Fensky already had, as his wife, for it was hers of her own right, and not from him *by descent, devise or bequest*,—or to the proceeds or avails thereof. (Sec. 2942 Gen'l Stats. Kansas 1909.) Under the statutes of Kansas, the wife's interest in realty "does not depend for its inception upon the death of the husband, as an inheritance would, but *springs into existence by operation of law upon a concurrence of seizin and the marriage relation.* This interest equaled one-half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, and which has not been sold on execution or other judicial sale, and which the husband had not conveyed at a time when his wife was not, and never had been, a resident

of the state, and which is not necessary for the payment of his debts."

McKelvey v. McKelvey, 75 Kan. 325, 89 Pac. 663.

(b) Furthermore, the statute, when properly construed, does not apply to the *other half of the Kansas realty* (including the lots covered by the sales contracts), for this descended to her *under the laws of Kansas*, and not under the laws of California. Statutes are not presumed to have any extra-territorial effect. (Lewis' Sutherland on Statutory Construction, § 13.) Other states, including Kansas, make no distinction between "separate" and "community" property; in such states the terms are unknown. So it cannot be said that the interest of Ferdinand Fensky in the Kansas realty or any other property not descending under the laws of California, comes within the proper meaning of section 1386 of the Civil Code of California. What is said herein as to land of course applies to the rentals and revenues from said land also.

(c) Furthermore, the property set apart to Mrs. Fensky as a homestead [Tr. pp. 632-3] did not go to her by *descent, devise or bequest,* but under the special statutes relating to probate homesteads. (Sec. 1465, Cal. Code Civil Procedure.) There being no minor children, such property was the absolute property of the widow, Mrs. Fensky. (Sec. 1468, Cal. Code Civil Procedure.) The complainants were never, therefore, heirs of Mrs. Fensky under this statute as to such

property, or as to the proceeds or avails thereof. (Estate of Beer, 55 Cal. Dec. 589.)

(d) Neither does the statute apply to the Stein, Sims and Kimmerly notes which were given to Mrs. Fensky by her husband prior to his death, and therefore were not his property at the time of his death. That subdivision 8 does not apply to property given by one spouse to the other before death, was specifically held in Estate of McCauley, 138 Cal. 546.

(e) Neither does the statute apply to the proceeds of the joint bank account [Tr. p. 252] or to the joint certificate of deposit. [Tr. p. 258.] In Estate of Beer, 55 Cal. Dec. 589, it was held that this provision applies only to "such property as comes by will or under the law of succession to the surviving spouse directly from and through the deceased spouse," and hence did not apply to a homestead which *by operation of law,* and not by descent, went to the surviving husband upon the death of the wife. The proceeds of the joint bank account went to Mrs. Fensky upon the death of her husband, *by operation of law,* by right of survivorship, and not by descent.

Crowley v. Sav. Union Bank, 30 Cal. App. 144;
Kennedy v. McMurray, 169 Cal. 287;
Estate of Harris, 169 Cal. 725.

So the section would not apply.

(f) Mrs. Fensky had some property of her own at the time of her marriage, and she later received a bequest from an old sweetheart. [Tr. p. 624.]

Clearly, the section by its own terms does not apply to this or the proceeds or avails thereof.

So, even though the statute relied upon had not been made entirely inapplicable by Mrs. Fensky's deeding away the property to the defendants prior to her death, still the statute would not, for the reasons above stated, apply to (a) the one-half interest in value of the Kansas realty, including the lots covered by the sales contracts in Fensky's Addition which Mrs. Fensky had as wife, nor to (b) the other half-interest therein which came to her under the laws of Kansas, and not under the laws of California, nor (c) to the property set apart to Mrs. Fensky as a homestead, nor (d) to the notes and the bank account given to Mrs. Fensky by her husband prior to his death, nor (e) to the joint bank account which Mrs. Fensky received by operation of law, and not by descent, nor (f) to the property that Mrs. Fensky had at the time of her marriage, or that which she later received by bequest from an old sweetheart. *These items constituted almost all of her estate.*

(4) The remainder of her estate to which the statute might otherwise be claimed to be applicable, was so mingled with her other property that it cannot be traced to its origin as a part of the separate property of Ferdinand Fensky, and therefore subdivision 8 cannot be applied even to it.

We quote the following extract from Estate of Brady, 171 Cal. 1, at p. 5:

> "It may also be conceded that if such community property is by the husband so mingled with his other property that it cannot be traced to its origin as a part of the community property, subdivision 8 could not be applied."

In Estate of Brady, the husband survived the wife, and the alleged mingling of what had once been community property of himself and wife with his own separate property occurred subsequent to the death of his wife, but was traced and established to be the proceeds of the identical property existing at the wife's death. Had such property been so intermingled, however, that it could not be traced, then subdivision 8 would (as the court states) not be applicable. The court also points out that the heirs of the predeceased spouse have nothing more than an "expectancy" in the property or its proceeds, during the life of the surviving spouse, and that the title of the surviving spouse is in no way affected by such expectancy. It therefore follows that the surviving spouse has a perfect right to sell it, give it away by deed or will, or to intermingle the property so as to lose its identity, even though the result is to defeat such expectancy.

(5) But even though such property had been sufficiently traced so that the court could properly find that at least some part of the property owned by Mrs. Fensky was the proceeds or avails of what had once been the separate property of Ferdinand Fensky, to

which the statute could have been held applicable, still complainants are entitled to no relief in this suit. They should have asserted such claim in the probate proceedings for the administration of the estate of Jeanette Fensky, and made proof showing that they were entitled to distribution of such portion of her estate. Not having done so, they are barred by the final decree of distribution in that estate, for the reasons already set forth in this brief.

There Are No Unadministered Assets of the Estate of Jeanette Fensky.

We wish to point out at the very start that even if there were any unadministered assets of the estate of Jeanette Fensky, it would be of no avail and of no concern to appellants herein, for two reasons: First, because the heirs at law of said deceased were conclusively adjudicated by the decree of distribution; and second, because appellants never were in fact heirs at law of the deceased, under the peculiar statute under which they claim. There are in fact no unadministered assets of the estate, for *two* reasons:

First, because the decree on its face distributed not only the property described in the decree, but "all other property belonging to said estate whether described herein or not." [Tr. pp. 663-664.] It is well settled by the decisions of the California supreme court that such an omnibus clause in a decree of distribution (which is quite commonly inserted for the very purpose of covering any assets accidentally omitted from

the decree or afterwards discovered), is valid. The rule is thus stated in Heydenfeldt v. Osmont, 178 Cal. 768, 773:

> "In the first place, it must be remembered that *under the decisions of this court decrees which by their terms distribute a residue known or unknown are sufficient to pass title to lands omitted from the particular description.* (Smith v. Biscailuz, 83 Cal. 344.) By such a decree the court is required to distribute all the residue to the persons entitled, and its order and decree are conclusive in this regard as to the rights of all distributees. (Code Civ. Proc., Sec. 1666; Humphrey v. Protestant Episcopal Church, 154 Cal. 455; Marcone v. Dowell, *ante*, p. 396.) It was the duty of the court making the distribution to decide who was entitled to the residue."

By the decree of distribution, therefore, there was distributed to the appellees named therein all the title to all property of every description which Jeanette Fensky owned at the time of her death. If any of the deeds or gifts or other items hereinafter referred to were invalid for any reason, the only effect of such invalidity would be that under the decree of distribution the title to any such property would pass in undivided interests to the distributees named in the decree. No further administration upon the estate would be required.

Second, the property *claimed* to have belonged to the estate of Jeanette Fensky at the time of her death,

was not proven to be property belonging to Jeanette Fensky at the time of her death.

The appellants having alleged that certain property belonged to the estate of Jeanette Fensky which was not accounted for by the administrator, the burden of proof of such allegations is clearly upon them. We submit that such burden of proof has not been sustained, but that the weight of the evidence is to the contrary.

All of the Deeds Given by Jeanette Fensky to Her California Heirs Were Delivered During Her Lifetime.

The testimony as to the delivery of these deeds will be found in the transcript at pp. 565-75, 622-4, 510-522. It will be seen that somewhat early in the last illness of Jeanette Fensky she sent for Mr. Ferguson, for the *expressed purpose of "disposing of her property and that she wanted* to do it by deeding it to the people that she wanted it to go to." [Tr. p. 573.] It is perfectly apparent that Jeanette Fensky was seeking thereby to make a present and final disposition of her property to her kindred, retaining only a life estate in the property. Pursuant to her instructions, Ferguson had the deeds prepared. As each one was signed she delivered it to Ferguson and instructed him to take and retain them in safe keeping until her death, and, the day after her death, to put them of record. [Tr. pp. 622-4, 566.] *She uttered not one word indicative of a desire or an intention to retain any domin-*

ion or control whatsoever over the deeds, or any of them. She intended that title to the property should thereby immediately pass to the grantees, she retaining a life estate in the property, and that Ferguson should hold the deeds as trustee for the grantees until her death. So far as she was concerned, the delivery was absolute. In her will, therefore, although the Kansas realty is mentioned, *she does not mention or dispose of the land covered by any of these deeds* [Tr. p. 732], for she knew as to such land that she had nothing to dispose of by will. So far as the grantees (who were present) [Tr. pp. 622-4] were concerned, the delivery was likewise absolute. We have here all of the elements of a valid, effectual and irrevocable delivery.

The depositary in such a case is the trustee of an express trust, with duties toward each of the parties which neither one thereof alone can forbid or enjoin. (Williams v. Kidd, 176 Cal. 367.)

Appellants sought to avoid the effect of the delivery of these deeds at the trial by proof that Mrs. Fensky had suggested to Mr. Ferguson that if he could sell the property at a profit, he should do so and she would *"make it right" with the grantees,* or words to that effect. Appellants have discussed the evidence on this point on this appeal as if there were no conflict in the testimony, and as if the decision in the lower court had been in their favor. Neither of the two witnesses upon whose testimony they rely could definitely remember the conversation had with the grantor at the time of the delivery of the deed. Neither could definitely

say just when the suggestion as to the future sale of the property was made. Mr. Parmele, when pressed for a definite statement of just what had been said replied, "It is so long ago I have forgotten just what the conversation was. I have forgotten the exact wording." [Tr. p. 517.] Mr. Ferguson, the depositary of the deeds, when likewise pressed for the language used, said: "The instructions were to hold them (the deeds) until her death." [Tr. p. 566.] "She told me to record the deeds upon her death and I did so. The deeds were in my custody until her death. *They were never back in her hands.*" [Tr. p. 573.]

Minnie F. Farnsworth, one of the grantees, who had lived with her since her husband's death [Tr. p. 622], in whose presence the deeds were delivered, related the incident as follows:

"After the various documents were signed, she (Mrs. Fensky) looked to Mr. Ferguson and said, 'You take these papers and hold them, and in case of my death, record them the next day.' * * * *I did not hear my aunt say to Mr. Ferguson in effect, 'You can sell any of this property that you want, or handle it just as you used to.' I did not hear her say anything other than what I have just stated.*" [Tr. p. 623.]

It should be remembered that the trial court had the opportunity to observe these witnesses and to more accurately determine which of the evidence as to a transaction so long since past could be relied upon.

For this reason every inference is indulged in in support of its decision.

Mastin v. Noble, 157 Fed. 506, 85 C. C. A. 98;
U. S. v. Marshall, 210 Fed. 595, 127 C. C. A. 231;
De Laski etc. Co. v. U. S. Tire Co., 235 Fed. 290, 292.

Furthermore the grantees named in the deed having produced the deed and the same being dated and acknowledged prior to the death of Mrs. Fensky, the burden of proof of non-delivery on the date the deeds bear was on the complainants.

Civil Code of Cal., Sec. 1055;
Zihn v. Zihn, 153 Cal. 405;
Phillips v. Minotte, 167 Cal. 328.

BUT EVEN TAKING THE DISPUTED EVIDENCE INTRODUCED BY APPELLANTS AS AN ASSUMED STATE OF FACTS, THE DELIVERY WAS SUFFICIENT AND PASSED A PRESENT INTEREST, FOR IT WAS UNCONDITIONAL AS RESPECTS THE INSTRUMENT.

A clear *distinction* is recognized in the law applicable to the delivery of deeds *between the power of control over the instrument* and *control over the property.* The former is the test of delivery of a deed. This is illustrated by the following authorities:

In Long v. Ryan, 166 Cal. 442, suit was brought to set aside a deed. On the day of its date, a deed executed by Sarah M. Ryan purporting to convey cer-

tain parcels of land to her two daughters, was delivered in a sealed envelope to the Title Insurance and Trust Company as custodian upon certain contingencies. The contingencies, however, did not happen within the time fixed, and finally the grantor endorsed the envelope while it was still in the possession of the custodian as follows:

> "This deed you will hold until July 22, 1910, at which time, if I be then living, you will deliver the same to me, but if I should die in the meantime, you will thereupon immediately upon my death deliver said deed to my daughters Mary N. Ryan and S. Maude Ryan."

Upon her death, the deed was so delivered. The court held the grantor retained *the power of control over the deed* and there was no delivery. The court said on page 444:

> "It has been many times declared by this court that where the owner of land signs a deed therefor to one person and thereafter delivers such deed to a third person, with directions to such third person to hold the same during the lifetime of such grantor and upon the grantor's death to deliver it to the grantee, intending at the time of such delivery to the custodian to part forever with all right or power thereafter to repossess, retake, or control *the deed,* such delivery is effectual and valid, and upon the death of the grantor the estate goes, by virtue thereof, to the grantee, who may then compel delivery, if necessary. * * *
>
> (Cases cited.)

> But these decisions declare that it is essential to the validity of such delivery that it shall be made without any conditions whereby the grantor may again obtain *control of the deed.* In Bury v. Young the court says: 'The essential requisite to the validity of a deed transferred under circumstances as indicated in this case, is that when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time.' * * * In Moore v. Trott the court, referring to the delivery to a third person, says that such delivery is valid, 'provided always—and this is the essential condition of the validity of such transfers—that the delivery is absolute so that the deed is placed beyond the power of the grantor to recall it or control it in any event.' "

In Moore v. Trott, 162 Cal. 268, the grantor executed deeds in favor of his wife and delivered them to his agents with instructions to deliver them to the grantee if he should die at a hospital whither he was going for an operation. He returned, however, from the hospital and *reinstructed his agent to hold the deeds and deliver them to his wife upon his death.* The case first reached the supreme court on appeal based upon the first instructions given by the grantor, and it was there held that as there was a clear implication therein that if the grantor should return from the hospital the deeds were to be at his disposal, there was no adequate delivery. (156 Cal. 357, cited by complainants.) On the second appeal, however, it was held that the *subsequent instructions above mentioned*

given by the grantor constituted a complete delivery, the court saying, on page 274:

> "The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the *instrument*, to the end that it may presently vest title in another."

In Ruiz v. Dow, 113 Cal. 490, the grantor, in order to avoid the delay necessitated by administration on his estate, executed a deed of his property in favor of his wife, the same containing the following recital:

> "This deed is to be inclosed in an envelope and deposited for safe-keeping in the First National Bank of Santa Barbara, with an endorsement on said envelope directing that at my decease the then cashier or president of said bank shall, at the request of my said wife, immediately file this deed for record with the recorder of said county of Santa Barbara.
>
> And I do hereby further declare as a part of this conveyance, and as my act and deed, that the filing of this deed for record, as above recited, at my decease, shall constitute and be a good, valid, and sufficient delivery of this deed to the grantee therein, as of the date of the execution thereof, as to all properties, both real and personal, belonging to me at the date of my decease."
>
> 113 Cal. pp. 494-495.

The deed was first delivered to his wife, but on the advice of his attorney was delivered to the cashier of the bank mentioned therein, with instructions to deliver

and record on the grantor's death. The court held that the delivery was complete and that the title immediately passed.

Even though it should be true that *after the instruments had been unconditionally delivered to Ferguson* Mrs. Fensky told him to *sell* the *land*, if he could, at a profit, and that she would make it good to the particular grantee affected thereby, this suggestion was perfectly consistent with the previous unconditional delivery of the deed to Ferguson, for these reasons:

(a) The direction in question as to selling the *land* had no reference to *dominion over the deed.*

(b) The direction recognized the irrevocable nature of the *present interest of the grantees*, because if the previous delivery had not been regarded by Jeanette Fensky as being effectual immediately to convey title in remainder to them, there would have been no occasion for her to make anything good to the grantee.

(c) The direction was designed to promote the interests of the grantees as well as those of the grantor, and in view of their presence at the time it was given, it is clear that Jeanette Fensky was acting as spokesman for herself as life tenant and for her grantees as owners of the remainder.

(d) As the delivery of the deed was already complete, and Ferguson had become the trustee of an express trust, with duties which neither party could forbid or alter without the consent of the other, it follows

that Jeanette Fensky's suggestion to Ferguson to sell the land if he could at a profit, was, at most, unauthorized, void and immaterial. Grilley v. Atkins, 78 Conn. 380, 62 Atl. 337, and cases there cited.

The situation is analogous in principle to that where the *habendum* clause in a deed attempts to limit the extent of the estate previously set forth in the granting clause. In such a case the rule is universal that the granting clause is good, and the attempted subsequent limitation in the *habendum* clause is void and of no effect. 2 Blackstone, 298; 3 Washburn on Real Property (5th ed.), p. 390, Secs. 612, 613.

In Smalley v. Smalley, 24 Ohio Appellate Reports 353, the grantor attempted to reserve to himself "full power to sell and convey said premises the same as if this deed had not been executed." The court held the attempted reservation void and of no effect, as repugnant to the grant, which the grantor must have intended should be effective.

Action taken or declarations made by the grantor after delivery is complete are incompetent and inadmissible for the purpose of disparaging the grantor's deed already delivered.

Bury v. Young, 98 Cal. 446;
Ord v. Ord, 99 Cal. 524.

> "And where the circumstances establish such a delivery as to constitute the deed a conveyance *in presenti*, evidence that the grantor afterwards executed other deeds purporting to convey the

same property, and that he also ordered the depositary to restore the deed is incompetent for the purpose of showing what his intentions were in transferring the deed to the depositary. Delivery to a third person with direction to record at the grantor's death has been held sufficient, with other circumstances, to sustain the deed. [Citing Bury v. Young, *supra.*] But not so where such direction is not accompanied by release of control over the instrument." [Citing Renehan v. McAvoy, 116 Md. 356, 38 L. R. A. (N. S.) 941.]

8 R. C. L. p. 998.

And again:

"* * * statements made by a grantor are inadmissible for the purpose of invalidating the deed where its delivery and acceptance has been established even though the parties have mistakenly supposed the legal effect would be different." [Citing numerous cases.]

8 R. C. L. 1003.

In Hayden v. Easter, 24 S. W. 626 (Ky.), the grantor executed a deed to his illegitimate daughter and delivered it to the depositary to be kept until the grantor's death and then to be recorded. Subsequently the grantor conveyed a portion of the land therein described to another. In holding that the delivery was complete, the court says:

"It appears that the grantor, after the execution of the deed, sold and conveyed some 10 or 12 acres of the land to another; and this circumstance, it is thought, shows that he retained con-

trol and dominion over the deed during his life, for which reason, it is insisted, the grantor did not intend to divest himself of the title. Nevertheless, the fact remains that, even if he had the legal right, he did not recall it, or attempt to, and, on the contrary, indicated an intention to give other land or money in lieu of what had been sold."

In Williams v. Evans, 154 Ill. 98, 39 N. E. 698, it was held that the retention of dominion and control over the *property* covered by a deed delivered to the trustees thereof named as grantees, was perfectly consistent with a valid delivery of the *deed* sufficient to vest title in the trustees, the deed providing that the grantor should receive the rents during his life; the court further held that the *subsequent* declarations and acts of the grantor, and of the trustees named in the deed, could not defeat the trust.

In the case at bar there was, of course, no such provision *in the deed*, but the purpose of Jeanette Fensky was identical, that is to say, to retain the beneficial use of the property during her life and the possession and control thereof and yet to give a remainder to her grantees who should come into possession and enjoyment upon her death.

As illustrating the proposition for which we contend, namely, that it is the parting with the custody and control of the *instrument* delivered, and not of the *property* covered thereby, that is the test of a valid delivery, see Kenney v. Parks, 125 Cal. 146, where a

husband and wife, respectively, executed deeds the one in favor of the other and delivered them to a cashier of a bank with instructions that upon the death of either, the deed of the decedent should be recorded and the deed of the survivor returned to him (or her). The husband died and the widow sued to quiet title. It was held that no title passed to her under the husband's deed. The court cites and quotes Bury v. Young, 98 Cal. 446, and says, in part:

> "The all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank the respective grantors did not absolutely part with all future dominion and control over them, but, upon the contrary, the actual intention and understanding of each grantor was that upon the death of the other the survivor should take back his own deed, and that no title should vest under it. The decision in Bury v. Young, *supra*, was rested upon a directly contrary state of facts, namely, that the grantor had parted with the control and possession of his deed for all time."
>
> 125 Cal. 150-151.

In Ruling Case Law the rule is thus declared:

> "The delivery of a deed to a third person in escrow is, generally speaking, sufficient if the grantor by his act of delivery loses all control over the instrument and by it the grantee is to become possessed of the estate."
>
> 10 R. C. L. 626 [citing Shults v. Shults, 159 Ill. 654, 50 Am. St. Rep. 188].

"While * * * the depositor's right of possession may return if the specified event does not happen, or the conditions imposed are not performed, yet to constitute an instrument in escrow, it is essential that the deposit of it should be in the meantime irrevocable, that is, that when the instrument is placed in the hands of the depositary, it should be intended to pass beyond the control of the depositor, and that he should actually part with all present or temporary right of possession and control over it." (*Idem.*)

"Strictly speaking, * * * the depositary is not an agent at all, but rather the trustee of an express trust with duties to perform for each of the parties and which neither can forbid without the consent of the other."

10 R. C. L. 633 [citing Seibel v. Higham, 216 Mo. 121, 129 Am. St. Rep. 502].

Appellants are in error in stating that the case of Stone v. Daily, 58 Cal. Dec. 462, militates against the distinction we contend for. It was there pointed out that the test is whether the grantor has reserved *the power of control over the deed* as distinguished from the physical control over the deed. The test is, we submit, has the grantee in his instructions reserved the power of control over *the deed* as distinguished from control over the *lands*. We call the attention of this court to the concurring opinion of Chief Justice Angellotti, pointing out that had the finding of the trial court been that a valid delivery had been made,

there would have been sufficient evidence in the record to support it, and the language of the majority opinion:

> "That afterwards, *no matter how shortly afterwards*, the parties changed their minds and sought to make another arrangement, as evidenced by the deposit with the bank, would make no difference. The transfer of title would have occurred, would have been a *fait accompli*, and could be undone only by a retransfer by Daily." (58 Cal. Dec. 462, 464.)

THERE IS NO SHOWING THAT THE STEIN, CAMPBELL AND GEORGE FENSKY NOTES AND THE OTHER SMALL ITEMS OF PROPERTY REFERRED TO BY APPELLANTS WERE IMPROPERLY OMITTED FROM THE INVENTORY.

As before stated, appellants having urged that these notes belonged to the estate, the burden of proof was upon them.

Estate of Vance, 141 Cal. 624, 626;

As to the Campbell, Stein and George Fensky notes, we do not rely upon the letters addressed by Mrs. Fensky to Stein and Campbell. These letters are the only thing in the record which appellants can point to, to sustain their claim, the burden of proof of which is upon them, that said notes were *never given* and *delivered* by Mrs. Fensky to the various donees thereof. The various donees were in possession of these notes at the time of death, and therefore were presumptively the owners thereof. The letters are significant, although not essential to appellees' claims, as showing

that appellee Farnsworth was holding the notes as the agent of the donees. The letters do not purport to be, and were evidently not regarded by Mrs. Fensky as effectuating the gifts. They were simply letters to the parties named, and nothing more. In any event, the letters are not inconsistent with a valid gift, completed by physical delivery, at some other time before her death.

The only two references in the record to the alleged George Fensky note are first—a statement in a letter of appellee Merriam to the executor Campbell that George Fensky "seems to have been a little put out because of an effort to hold him to account for $200 which was either *given* or loaned to him during Mrs. Fensky's lifetime, to the extent of requiring him to give a hundred dollars of it to Charles" [Fensky] [Tr. p. 611], and second—his testimony that he did not "recall ever having a note that was executed by George Fensky to Mrs. Jeanette Fensky." [Tr. p. 612.] The foregoing are not only entirely consistent with a valid gift, but indicate that such was the fact. Appellants have not established the burden of proof upon them, to show the contrary.

The item of $800 claimed to have been omitted from the inventory was in joint names of Mrs. Fensky, Mrs. Schmidt and Mrs. Katzung [Tr. p. 548], and upon the death of Mrs. Fensky, passed to Mrs. Schmidt and Mrs. Katzung by right of survivorshp, nor was it ever called to the attention of the administrator. [Tr. p. 549.]

As to the assignment of the Webster mortgage to appellees Katzung and Schmidt, it appears that this assignment was executed on the same date as the deeds referred to and delivered to Mr. Ferguson with instructions to hold it and to record it immediately upon the death of Mrs. Fensky. [Tr. pp. 511-512, 567, 623.] It is not claimed with reference to the assignment that there were any qualifications to these instructions. It is quite clear under the authorities cited showing the sufficiency of the delivery of the deeds, that the assignment of this mortgage was properly delivered, and did not belong to the estate of Jeanette Fensky.

Appellants Are Not Entitled to Any Relief Against Appellee Merriam.

Appellee Merriam was the administator of the estate of Jeanette Fensky in California and was duly discharged on October 13, 1909, the court finding that he had "performed all the acts lawfully required of him as such administrator." [Tr. pp. 664, 665.]

The only relief *prayed for* against the appellee Merriam is that he "be required to account to these appellants for their distributive shares of the estate of said Jeanette Fensky which came into his hands and was by him distributed to said Wellke, Katzung and Schmidt". (Par. 5 of the prayer of bill of complaint.)

The money and personal property referred to having been turned over to the persons *therein* named, *under order of court,* to-wit, under the final decree of distribution in the estate of Jeanette Fensky, the appellee

Merriam is completely protected thereby. An officer of a court acting is protected by the court's order.

Tapscott v. Lyon, 103 Cal. 297, pp. 308, 312, 23 Ruling Case Law, p. 79;

Harris v. Starkey, 176 Mass. 445, 57 N. E. 698.

In fact, if Merriam had not complied with the order of court he would have been personally liable on his bond.

L. Harter Co. v. Geisel, 18 Cal. App. 282, 286:

"The heirs, devisees, legatees and creditors are of course interested in the disposition that the court may make of the funds found to be in the hands of the administrator, and if injuriously affected thereby may in proper time appeal from the order of the court disposing of the estate. If they do not do so, they are bound by the decree made by the court; and it necessarily becomes the duty of the administrator to dispose of the funds in his hands as directed by the order of the court.

"The disposition which the court might make of moneys in their hands belonging to the estate is immaterial to the administrators. All that they are concerned in upon a settlement of their account is to be credited with the various payments they have made, and to have the accounts settled according to the correct amount in their hands. Whatever disposition the court makes of this amount is no concern of theirs, and, if the parties interested therein make no objection to the order, they should be content." (Estate of Sarment, 123 Cal. 331 [55 Pac. 1015].)

He would likewise have been in contempt of court if he had not complied with the decree of distribution. Wittmeier's Estate, 118 Cal. 255, 256.

Not being "a party aggrieved" by said decree, having no personal interest in the estate, he could not question the decree by appeal, or otherwise. *In re* Williams Estate, 122 Cal. 76.

Although there is nothing in the prayer of the bill of complaint asking for such relief, complainants, under paragraph XI of their brief, claim that the defendant Merriam in some way is liable to them for the value of the lands conveyed by Mrs. Fensky to the other defendants herein prior to her death. So far as we can make out from their brief, their theory is that appellee Merriam knew that such deeds were not delivered, as alleged, prior to Mrs. Fensky's death; that he knew of all the detailed facts set forth in their bill of complaint, which complainants claim entitle them to distribution of these lands, and that he wilfully, with intent to deceive complainants, omitted to inventory the lands covered by these deeds.

We submit that this question is not material in this case, *first*, because of the binding effect of the decree of distribution which distributes all the property of the estate of Jeanette Fensky whether described in the decree or not. [Tr. p. 664.] *Second*, because appellants were never heirs at law of the deceased. *Third*, it does not appear that there are any unadministered or undistributed assets belonging to the estate of Fer-

dinand Fensky. *Fourth,* under Griffith v. Godey, 113 U. S. 89, this court's jurisdiction as to property that in fact can be said to be "unadministered assets" exists, whether *"accidentally or fraudulently* withheld from the account. Therefore, whether the alleged withholding was fraudulent or not is of no consequence in this case.

In view, however, of the fact that Judge Merriam is one of the attorneys of record in this case for these appellees and in view of the vituperation and innuendo contained in appellants' brief, we cannot let such charges go unchallenged.

Judge Merriam testified as follows:

"No funds from the so-called Webster mortgage came into my hands while I was handling the estate, either as representative of the estate or as representative of any of the defendants. Every dollar that came into my hands as the administrator of the estate was deposited in that account and paid out by check." [Tr. p. 606.]

As to the notes in controversy, the record shows that after consultation with Mr. Campbell, the executor named in the will [Tr. p. 607], and questioning one of the donees of said notes [Tr. p. 451], they decided that these notes had been given to the donees by delivery. [Tr. pp. 606, 607.] The record further shows that the only persons who ever appeared as heirs in the estate did not question the validity of these gifts. [Tr. pp. 610, 613, 652.] The notes were treated throughout the administration as unquestioned valid

gifts [Tr. pp. 618, 619] and were paid by the persons obligated thereon upon that theory. [Tr. pp. 607, 618, 619.]

As to the joint bank account, it positively appears that this was not brought to the attention of Judge Merriam. [Tr. p. 549.]

As to the knowledge of Judge Merriam of the alleged non-delivery of the deeds executed by Mrs. Fensky in the fall of 1907, preceding her death in July, 1908, we submit, first, that if in fact Judge Merriam had been informed of all the facts and circumstances surrounding the delivery of those deeds, he would properly have come to the conclusion that the deeds were properly delivered and not a part of the estate of Jeanette Fensky for the reasons herein set forth.

However, the record does not show that Judge Merriam had any knowledge of the alleged non-delivery of said deeds. He specifically denied such knowledge. [Tr. pp. 606, 620.] There was a strenuous attempt made by counsel for appellants to show that the circumstances surrounding the delivery of these deeds were discussed between the various donees thereof in Judge Merriam's office soon after the death of Mrs. Fensky. Mrs. Farnsworth testified that no question ever arose about the delivery of the deeds until after Mrs. Fensky's death the parties took possession of the various properties deeded to them [Tr. p. 601] and that the discussion which arose then grew out of the dissatisfaction of some of the donees and a feeling that

they had been discriminated against. [Tr. p. 604.] She stated positively that there was no discussion in Judge Merriam's office as to whether or not the deeds executed by Mrs. Fensky had been validly delivered. [Tr. pp. 603, 624.]

The witness Ferguson testified that he did not remember having "any conversation with the defendant Merriam concerning the validity of the deeds." [Tr. p. 569.]

The statement of Judge Merriam that he was afraid of a contest with the Fensky heirs relied upon by appellants as showing knowledge of the alleged non-delivery of the deeds is conclusively answered by the only documentary evidence in the record, namely, a letter written by him to M. T. Campbell, the executor named in the will, in which he states that George and Charles Fensky were disappointed that a more liberal provision was not made for them and "there was a little talk of making some sort of a contest, a rumor that they were employing counsel and of *another will made previously to this one with different provisions.*" Judge Merriam said, in this letter, after referring to the rumors, "but I cannot myself see how they would have reasonable prospects of success in any sort of a contest." [Tr. p. 611.]

The witness Thompson, who testified that Judge Merriam expressed a doubt as to the validity of the deeds [Tr. p. 545] admitted on cross-examination that he felt very bitter and hostile toward Judge Merriam [Tr. pp. 551, 552], stating that "one hostility after

another adds venom—fuel to the fire." It subsequently developed that this hostility grew out of the fact that Judge Merriam had disallowed a claim presented by Mr. Thompson for money alleged to have been loaned to Mrs. Fensky. That this claim was properly disallowed is shown by the fact that suit was never brought upon it. [Tr. pp. 550, 551, 553.] Furthermore, it subsequently developed that the doubt which the witness stated Judge Merriam had relating to the deeds, had to do with the mental competency of Mrs. Fensky to make the same [Tr. p. 554], she being in her last illness at the time. This agrees with Judge Merriam's testimony [Tr. p. 620], although as before stated, he did not believe that they "would have any reasonable prospects of success." [Tr. p. 611.]

If Judge Merriam ever believed, which he clearly did not, that these deeds were undelivered, it cannot be supposed that he would endanger his good name and character by failing to attack the same merely to accommodate the grantees named therein. His self-interest was in exactly the opposite direction, for if these properties were to be included in the administration proceedings, his fees as administrator would be greatly multiplied.

Appellants, at best, can claim only that there is a conflict in the evidence on this subject. We submit that the weight of the evidence is clearly against them. Furthermore, that the trial court having the opportunity of seeing the witnesses and observing their conduct upon the witness stand, was far more able to determine

the truth than is this court. The trial court determined the issue in Judge Merriam's favor, and all intendments and presumptions being in favor of the decision of the lower court (see cases already cited), we submit that such determination was *right,* and ought not to be disturbed.

The statement in appellants' brief (p. 179) that appellee Merriam "advised concealment of the property to deceive the appellants and their co-heirs," is not only without support in the evidence, and therefore extremely unfair to Judge Merriam, but it is conclusively refuted by the record. [Tr. pp. 556, 561, 541, 626.]

At most, even though the facts justified the application of such rule, which they certainly do not, the defendant Merriam can only be be charged by persons *interested in the estate,* and then only with such assets of the estate as were lost to the estate through bad faith or through negligence. Neither has been proven.

Wheeler v. Bolton, 92 Cal. 159, at p. 171.

An administrator is not an insurer of the assets of an estate; neither does he warrant that the property inventoried constitutes all of the assets of the estate.

18 Cyc. 292, and cases cited.

Appellants Are Barred From Any Relief in this Court as Alleged Heirs of Jeanette Fensky, by Their Own Laches.

Of course, in view of the binding effect of the decree of distribution and what has already been said showing that appellants never were heirs-at-law of Mrs.

Fensky, and also in view of the failure of appellants to show that there are in fact any unadministered assets of the estate of Jeannette Fensky, they are not entitled to relief in any event. Assuming for the sake of argument, however, that they could overcome *all* of the foregoing obstacles (which they would have to do before they were entitled to any relief), still such relief would be barred by their own *laches.*

The federal courts have no probate jurisdiction. Any relief granted in the case of unadministered assets is granted by the court sitting as a court of equity. *Laches is a favored doctrine in courts of equity.* In Naddo v. Bardon (C. C. A., 8th Cir.), 51 Fed. 493, Mr. Justice Brewer said:

> "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many."

It affirmatively appears by the admissions in the pleadings that appellants had knowledge of all the pro-

ceedings in the estate of Jeannette Fensky, and that they paid attention thereto and took copies of papers from time to time. [Tr. p. 27.] They therefore must have known, and did know, that the estate was being administered upon the theory that the brothers and sisters of the deceased,—her only surviving next of kin,—were also her only heirs at law. If the claims which they now assert are true, appellants would have been entitled to some proportionate part of the $3500 inventoried in the estate and which the petition for final distribution prayed should be distributed to said next of kin; yet appellants failed to appear therein. The estate was distributed to the surviving next of kin as far back as September, 1909 [Tr. p. 663], and on October 13, 1909, the administrator of said estate was discharged. This suit was not commenced until July 8, 1914. [Tr. p. 33.]

The persons to whom the same was distributed have no doubt expended the same, and it would be highly inequitable to compel the administrator to account therefor after all these years, as appellants pray.

As to the property covered by the deeds, it does not appear but that the intervenor Charles Fensky and appellant Johanna Schutt (neither of whom testified) had knowledge of all the facts and circumstances upon which they now rely in their belated attack upon said deeds as far back as 1907 or 1908. Appellant Louisa Pickens testified that she had her first knowledge concerning the alleged non-delivery of the deeds in 1913; that she obtained such knowledge through her attorney

who investigated the estate in 1912. She stated: "I employed him to make the investigation." [Tr. p. 543.] We submit that there being no affirmative acts of concealment by any of appellees of the facts concerning the delivery of these deeds, that the showing made as to the manner in which such information was discovered, fails to comply with the rule laid down in Wood v. Carpenter, 101 U. S. 135, from which this court on the previous appeal (Pickens v. Merriam, 242 Fed. 363, 369), quoted as follows:

> "In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.'"
>
> 242 Fed. 369.

This not being a case where appellant Louisa Pickens' lack of knowledge "has been produced by affirmative acts of the guilty party in concealing the facts from the other" (Bailey v. Glover, 88 U. S. 342, 348), under the decision of this court upon the previous appeal, the doctrine above quoted from the case of Wood v. Carpenter, *supra*, prevails.

It appears from the evidence that the grantees named in said deeds have since the death of Jeanette Fensky in 1908 taken possession thereof, made valuable improvements thereon, and expended thousands of dol-

lars for improvements, interest, taxes, street assessments, insurance, etc., besides paying off incumbrances; that some of the property has been sold. [Tr. pp. 733-738.] In view of these circumstances and these expenditures, it was certainly inequitable for the appellant Louisa Pickens, after sitting quietly by all these years, to commence suit, and make known her claims for the first time, *six years thereafter*. Not only has actual prejudice been shown to have been caused by the great delay in commencing this action, but the circumstances have been such that prejudice will be presumed.

McNeil v. McNeil, 170 Fed. 289, 291-292;
Kleinclaus v. Dutard, 147 Cal. 245, 249.

In the case last cited the supreme court of California said:

> "Where the lapse of time in the assertion of the claim and the enforcement thereof, taken in connection with the circumstances disclosed are such as to show inexcusable delay on the part of the claimant, considerations of public policy, and the difficulty of doing entire justice obtain and are often sufficient to warrant a court of equity in declining, upon the ground of laches, to commence an investigation."
>
> 147 Cal. 249.

Conclusion.

This case has been heard on its merits as to the issues of fraud charges, by three separate courts, to-

wit, the district court and the supreme court of Kansas, and by the United States district court for the southern district of California, and no one of these courts has been able to find any equity in appellants' case. It is a typical application of the statement set forth in the opinion of the circuit court of appeals, second circuit, in DeLaske etc. Tire Co. v. United States Tire Co. (1916), 235 Fed. 290, 292:

> "This is a litigation aptly suggesting the truth that, while an appeal in equity brings up all the facts for review, there must come a time when the suitors' right to new investigations of complicated occurrences is properly limited to the indication of palpable error, and does not extend to discussion of matters about which all experience shows careful men may justly differ. Three courts have now arrived at the same conclusion in respect of the 'Goodrich use'; there is certainly evidence on which to base their findings; and, substantially the same evidential material having been used throughout, we regard the fact that the Goodrich Company did what has been so often found as having passed into the realm of settled things."
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> 235 Fed. 292.

For the reasons herein stated and upon the authorities herein cited, these appellees respectfully submit that appellants are not entitled to any relief either upon the ground of fraud or as heirs at law of the estate of Jeanette Fensky; that there is no equity in

their case, and that the decree of the district court dismissing the action should be affirmed.

Respectfully submitted,

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JAY D. RINEHART,

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(NOTE.—The length of this brief is to be attributed to the voluminous record in the case containing about 800 pages, and the necessity of arguing the evidence upon a large number of issues of fact, and to the large number of legal questions involved in appellants' alleged cause of action.)